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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND,

IN 1806, 1807, 1808, & 1809.

BY THOMAS HARRIS,
Clerk of the Court of Appeals,
and
REVERDY JOHNSON,
Attorney at Law.

VOLUME II.

HERRICK & ALLEN

ANNAPOLIS:
PRINTED BY JONAS GREEN.
1826.

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ERRATA.

PAGE. LINE.

58——25 For *appellees* read *appellee*.
64——19 In the margin—For *(E. S.)* read *(W. S.)*
89——1 Erase after the word *Delight* in the first line to and including the word *Delight* in the third line.
96——7 After this line insert JUDGMENT AFFIRMED.
97——22 Before *May* insert inverted commas.
99——3 Of the marginal note. For *effect* read *affect*.
102——32 For *the plaintiff* read *him the defendant*.
104——41 For 1796 read 1706.
113——1 For *pro ut* read *prout*.
190——32 Erase *in*.
193——27 For 1766 read 1796.
230——56 Of the marginal note. For *liberal* read *literal*.
245——4 After *bond* insert, *which was executed to the Proprietary on the 20th of January*, 1774.
251——33 For *by* read *to try*.
253——30 Before *called* insert inverted commas.
258——22 For *Laws* read *Lawson*.
378——39 Erase *not*.
408——1 For *trustee* read *trustees*.

IN THE INDEX.

520——tit. CONVEYANCE 10, line 5. For 4 read 44.
521—— tit. COURT OF CHANCERY 13, line 4. After *such* insert *matter*.
533——tit. EJECTMENT 35, line 18. After *was* insert *no*.
543——tit. EXECUTORS & ADMINISTRATORS 8, line 1. For *the executor, &c.* read *an executor de son tort*.
550——tit. HEIR 1, line 3. For *it* read *in*; and after *being* insert a comma.
555——tit. LOCATION OF LANDS 8, line 23. After *the* insert *two*.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.
Hon. JAMES TILGHMAN, Judge.
Hon. WILLIAM POLK, do.
Hon. JOHN BUCHANAN, do.
Hon. JOSEPH HOPPER NICHOLSON, do.
Hon. JOHN MACKALL GANTT, do.
Hon. RICHARD TILGHMAN EARLE.(a) do.

OF THE COURT OF CHANCERY.

Hon. ALEXANDER CONTEE HANSON, Chancellor.
Hon. WILLIAM KILTY,(b) do.

OF THE LATE GENERAL COURT.

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.
Hon. GABRIEL DUVALL, Judge.
Hon. JOHN DONE, do.
Hon. RICHARD SPRIGG,(c) do.

OF THE LATE COUNTY COURTS.

FIRST DISTRICT—*Saint-Mary's*, *Calvert*, *Charles* and *Prince-George's* Counties.
Hon. MICHAEL JENIFER STONE, Chief Justice, appointed 17th of January 1791.
Hon. RICHARD SPRIGG, do. do. 28th of January 1802.
Hon. JOHN MACKALL GANTT, do. do. 11th of February 1803.

SECOND DISTRICT—*Cecil*, *Kent*, *Queen-Anne's* and *Talbot* Counties.
Hon. JAMES TILGHMAN, Chief Justice, appointed 17th of January 1791.

THIRD DISTRICT—*Anne-Arundel*, *Baltimore* and *Harford* Counties.
Hon. HENRY RIDGELY, Chief Justice, appointed 25th of November 1796.

FOURTH DISTRICT—*Caroline*, *Dorchester*, *Somerset* and *Worcester* Counties.
Hon. WILLIAM WHITTINGTON, Chief Justice, appointed 25th of February 1799.
Hon. WILLIAM POLK, do. do. 28th of January 1802.

FIFTH DISTRICT—*Washington*, *Frederick*, *Montgomery* and *Allegany* Counties.
Hon. RICHARD POTTS, Chief Justice, appointed 15th of October 1796.
Hon. WILLIAM CRAIK, do. do. 20th of October 1801.
Hon. WILLIAM CLAGGETT, do. do. 28th of January 1802.

OF THE NEW COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*Saint-Mary's*, *Charles* and *Prince-George's* Counties.
Hon. JOHN MACKALL GANTT, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. DANIEL CLARKE, do.

(a) Appointed the 20th of May 1809 to fill the vacancy occasioned by the death of Judge *Tilghman*.
(b) Appointed the 25th of January 1806 in the place of Chan. *Hanson*, deceased.
(c) Appointed the 29th of December 1802 to fill the vacancy occasioned by the resignation of Judge *Duvall*.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen-Anne's* and *Talbot* Counties.
Hon. JAMES TILGHMAN, Chief Judge
Hon. LEMUEL PURNELL, Associate Judge.
Hon. EDWARD WORRELL, do.
Hon. RICHARD TILGHMAN EARLE, Chief Judge(d).

THIRD JUDICIAL DISTRICT—*Calvert, Anne-Arundel* and *Montgomery* Counties.
Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.
Hon. HENRY RIDGELY, Associate Judge.
Hon RICHARD HALL HARWOOD, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset* and *Worcester* Counties.
Hon. WILLIAM POLK, Chief Judge.
Hon. JOHN DONE, Associate Judge.
Hon. JAMES B. ROBBINS, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington* and *Allegany* Counties.
Hon. JOHN BUCHANAN, Chief Judge.
Hon. WILLIAM CLAGGETT, Associate Judge.
Hon. ABRAHAM SHRIVER, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.
Hon. JOSEPH HOPPER NICHOLSON, Chief Judge.
Hon. THOMAS JONES, Associate Judge.
Hon. ZEBULON HOLLINGSWORTH, do.

OF THE COURT OF OYER & TERMINER, &c.

Hon. WALTER DORSEY, Chief Justice, appointed 9th of February 1800,
Hon. JOHN SCOTT, do. do. 5th of April 1808.

ATTORNEY GENERAL.

Luther Martin, Esquire, appointed 11th of February 1778.
William Pinkney, Esquire, do. 21st of December 1805.
John Thompson Mason, Esquire, do. 12th of July 1806.
John Johnson, Esquire, do. 18th of October 1806.

(d) Appointed the 20th of May 1809 in the place Ch. J. *Tilghman*, deceased.

A TABLE

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

COURT OF APPEALS, JUNE TERM, 1806.

Winchester vs Brooke

WINCHESTER, *et al. vs.* BROOKE.

APPEAL from a decree of the Court of Chancery. The bill, filed by the present appellee, stated that *Brooke*, the complainant, being possessed of and entitled to 80 shares of stock in the Bank of *Columbia*, and being desirous of disposing thereof, did, in May 1795, make application to *Solomon*, one of the defendants, who at that time acted as broker in *Baltimore*, to sell them for him. That *Solomon* informed *Brooke* he had a commission to purchase shares in the Bank of *Columbia* for a gentleman in *Philadelphia*, and that he would, and did purchase the shares of *Brooke*, for which *Solomon* agreed to give, and did give to him, his promissory notes for $2424, the one half payable in 26 days, and the other half payable in 28 days, and the shares were transferred by *Brooke* to *Solomon*. That *Solomon*, in 4 or 5 days after the date of the notes, became bankrupt, and on the 18th of May 1795, made and executed a deed of trust to *Winchester*, &c. the other defendants, of his effects and property, in trust, to be distributed among his creditors. That under and in virtue of the assignment, the assignees, *Winchester*, &c. lay claim to the 80 shares, (*Solomon* not having disposed thereof for a fair

S. B. sold and transferred to E S. 80 shares of bank stock, and took his notes therefor. Two days thereafter E S. became insolvent, and transferred all his property to trustees for the benefit of his creditors The trustees sold the stock, and received the proceeds. On a bill filed by S B against E S, and the trustees, claiming to be paid the notes out of the proceeds of the sale of the stock, in preference to the other creditors, it seems that he was not entitled to such preference

Where a preference is claimed by one of the creditors, it should appear by the proceedings, that there were other creditors whose claims are proved and allowed; also the amount of the state and claims should appear, so as to show the proportion which the creditor, claiming the preference, is entitled to, in case he had no right to a preference.

1806.
Winchester v. Brooke

and *valuable* consideration to any person whatever before his failure,) they alleging that the shares, or the nett proceeds thereof, must be applied equally among all the creditors of *Solomon;* although *Brooke* charges, that he hath an *equitable lien* on the shares, or the proceeds thereof, in preference to any other of the creditors of *Solomon*, the shares having been a fund created on the credit of the notes, and not having been since assigned *to a purchaser for a valuable consideration, without notice of such equitable lien.* That *Brooke* hath applied to the assignees, *Winchester*, &c. who refuse to pay him the amount of the shares, or the value thereof, alleging that *Brooke* hath not any preference to the other creditors. *Prayer*, that the defendants be compelled to pay to the complainant the said shares, or the value thereof, in preference of the other creditors of *Solomon*, and true and perfect answers make, &c. Also to account with and pay to the complainant the said shares, or the value and nett proceeds thereof, in satisfaction of the notes; and that the complainant may have such other remedy in the premises as the nature of his case doth or may require, &c.

The *answer* of *Winchester*, &c. so far as is material, stated, that when *Solomon* executed the deed of trust to them, he was insolvent, and owed large sums of money to several persons, far exceeding the value of all the property and effects which he was interested in, or had any title to. That these defendants had no notice, at the execution of the deed, that *Solomon* was indebted to the complainant, or any other person, for the 80 shares. That these defendants, all of whom are the creditors of *Solomon*, did, in July 1799, sell the shares for $1613. That they are willing to pay to the complainant his proportion of all monies which they received in virtue of the deed, and have always been willing to pay the same; but the complainant has refused to make any application therefor. They insist that the complainant has no lien, either equitable or legal, on the shares, or the money arising from the sales thereof, for the payment of the notes, as the shares were legally transferred to *Solomon*, and by him to these defendants. They say, that they have been informed by *Solomon*, and believe the fact to be, that *Solomon* purchased the shares on his account, and for his own benefit and use.

1806.

Winchester vs Brooke

The *answer* of *Solomon* is similar to the preceding answer. That at the time he executed the deed of trust, he was indebted to a number of persons far exceeding the value of the property and effects to which he was entitled. That he did not inform the trustees, at the time he executed the deed, or at any time before, that he had not paid the complainant for the 80 shares. That after the execution of the deed he did not interfere in the administration of his effects, but the same, since that period, has been under the entire and exclusive control of the trustees. That on the 18th of May 1795, and after the execution of the deed, he was arrested at the suit of some of his creditors, and confined in gaol in *Baltimore;* and that on the succeeding day the certificate of the transfer of the 80 shares was received by the trustees. He positively denies he ever told the complainant that he had a commission to purchase shares in the Bank of *Columbia*, or in any other bank, for a gentleman in *Philadelphia*, or any other place whatever, or that he acted as a broker in making the contract with the complainant; but he expressly says, that he purchased the shares on his own account, and for his own use and benefit. That the complainant, about 18 months after the purchase of the shares, applied to this defendant to sign an instrument of writing, stating that he had purchased the shares on commission, which he refused to do.

Testimony. That the trustees of *Solomon* sold at auction 80 shares in the Bank of *Columbia*, to *John Munnickuysen*, on the 22d of July 1799, for $2480, which, after deducting duties and commission, amounted to $2413. That *Charles Lowndes*, in May or June 1799, requested *Munnickuysen* to purchase for him 80 shares in the Bank of *Columbia*, who purchased the same for him for 31 dollars a share, amounting to $2480. That the shares had been previously held by *Lowndes* in trust for the trustees of *Solomon*. That the dividends had been paid to the trustees. That after the sale to *Munnickuysen*, for the benefit of *Lowndes*, the shares were transferred to *Lowndes*. By the *Auditor's* statement, the defendants are charged with the nett amount of the sales of the 80 shares at auction, $2413 00

Also with dividends received, and interest thereon to the 22d of July 1799, 1184 14

$3597 14

1806.

Winchester vs. Brooke

They were credited with 10 dollars paid on each of the shares, to complete the payments due to the bank on the shares; and also credited with the dividends and interest arising thereon as charged, $99 28

Balance due to complainant, $2697 85

Hanson, Chancellor, (24th of March 1803,) being of opinion that the complainant was entitled to payment of two notes, given to him by the defendant, *Solomon*, on account of eighty shares of *Columbia* bank stock, transferred by the complainant to *Solomon*, out of the nett proceeds arising from the sale of the bank stock, so far as the same would extend, in preference to the other creditors of *Solomon—Decreed*, that the defendants, *Winchester*, &c. pay to the complainant the sum of $2697 85 cents, the same being the amount of the dividends and nett proceeds of three fourth parts of the sales of the eighty bank shares, according to the statement thereof made by the auditor of this court, together with interest, till paid, from the service of this decree. That the complainant and defendants sustain the costs by them respectively expended in the prosecution and defence of this suit.

The chancellor does not conceive that interest can be allowed, as proposed by the counsel, viz. from the 22d of July 1799 to the 24th of March 1803. If it were allowed it must either be charged to the trustees, or must come out of the estate of the insolvent, to the prejudice of other creditors. The latter would be surely unreasonable, when it does not appear that the trustees have received interest. From this decree the defendants, *Winchester*, &c. appealed to this court.

The cause was argued before Chase, Ch. J. Tilghman, Polk, Buchanan, Nicholson and Gantt, J.

Harper, for the appellants, cited and relied on *Ellis vs. Huntt*, 3 *T. R.* 464. *Lickbarron vs. Mason*, 2 *T. R.* 63. *Barnes vs. Freeland*, 6 *T. R.* 80. *Green vs. Farmer*, 4 *Burr.* 2214. *Exparte Ockenden*, 1 *Atk.* 235. *Pollexfen vs. Moore*, 3 *Atk.* 273. *Walker vs. Preswick*, 2 *Ves.* 622. 2 *Roll. Ab.* 92, *pl.* 1, 2, 6. *Brennan vs. Current*, *Sayer's Rep.* 224. *Com. Dig.* tit. *Agreement*, (B. 3.) *Bond vs.*

1806.

Baker vs The State

Kent, 2 *Vern.* 281. *Fawell vs. Heelis*, *Ambl.* 724. *Grimes vs. French*, 2 *Atk.* 141; and *Walpole vs. Orford*, 3 *Ves.* 416.

Shaaff, for the appellee, referred to *Ridgely vs. Carey*, 4 *Harr. & M'Hen.* 167. He contended that the decree of the chancellor might be supported by the allegations and proof, independently of the principle of *lien*, as it did not appear that any person, but the complainant, had a right to the proceeds arising from the sale of the stock.

Tilghman, J. It is inconceivable how the chancellor could take the case up on the ground of preference.

The court of appeals were about to affirm the decree of the court of chancery, inasmuch as it did not appear by the record that there were any other creditors but the complainant, whose claims had been proved and were allowed; nor had the trustees set forth the amount of the estate of *Solomon*, and the amount of the claims against the estate, so as to show the proportion which the complainant was entitled to, in case he was not entitled to a preference; but the counsel for the appellants

DISMISSED THE APPEAL.

Baker *vs.* The State.

June.

A Faro Table set up in a house, not a dwelling-house, out-house, or place occupied by a tavern-keeper, retailer, &c. is not an offence under the act of 1797, *ch.* 110, which directs that "no Faro Table," &c. "shall be set up, kept or maintained in any dwelling-house, out-house, or place occupied by any tavern keeper, retailer," &c.

Whether or not the court can refuse to permit the counsel in a criminal case from arguing to the jury against the court's construction of an act of assembly, after the court had been called upon to give a construction to the act? *Quere.*

Error to *Charles* county court in a criminal prosecution. The indictment stated, that *Baker*, (the plaintiff in error,) on the 21st of March 1803, "unlawfully did set up a *Faro Table*, for the purpose of gaming, in a house in *Charles* Town, in the county aforesaid, by the said *John Baker* for that purpose rented, against the form of the act of assembly in that case made and provided, and against the peace, dignity, and government of the state." *Not Guilty* was pleaded. At the trial the attorney for the state, to support and maintain the prosecution, gave in evidence to the jury that *Baker*, the traverser, was a resident of the city of *Baltimore*, and on the 21st of March 1803, came from the city of *Baltimore* to *Port-Tobacco*, in *Charles* county, where he rented a house of a certain *J. E. Ford*, for the term of fifteen days, and that the traverser did, on the day and year aforesaid, set up a Faro Bank, and played at Faro in the house rented by him of *Ford*. The traverser

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gave in evidence to the jury, that the place aforesaid was not a dwelling-house occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider; and that it was not an out-house occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider, or place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider. The attorney for the state then prayed the court to direct and instruct the jury, that if they find from the evidence that *Baker* did set up a Faro Table, and play at Faro in the house stated in the indictment, they ought to find a verdict for the state. To which prayer the traverser, by his counsel objected, and contended before the court that he was not guilty of any offence against the act of assembly, entitled, "*An act to prevent excessive gaming*," unless the jury should find from the evidence that the place aforesaid was a dwelling-house occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider, or an out-house occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider, or place occupied by a tavern-keeper, retailer of wine, spirituous liquors, beer or cider. But the court, (*Gantt*, Ch. J.) instructed and directed the jury, agreeably to the prayer of the attorney for the state, and refused to permit the counsel for the traverser to argue to the jury on the construction of the act of assembly as contended for by him in his objection to the prayer of the prosecutor. Whereupon the traverser, by his counsel, prayed leave to except to the opinion and direction of the court to the jury, and also to the opinion of the court, in refusing to permit him by his counsel to argue on the construction of the act of assembly, and that the court would sign and seal this his bill of exceptions, &c. Verdict guilty, and judgment that the traverser be fined, and forfeit and pay to the state the sum of £50 current money for the offence aforesaid, &c. To reverse which judgment the traverser brought the present writ of error.

The cause was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, and NICHOLSON, J.

T. Buchanan, for the plaintiff in error, referred to the act of 1797, *ch.* 110. The *second section* of which declares that "no E O, A B C, L S D, or Faro Table, or other device, except billiard tables, for the purpose of gaming

for money, shall be set up, kept or maintained, in any dwelling house, out-house, or place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider, whether such person have a licence or not, on pain of forfeiting every such E O, A B C, L S D table, or other device, and of forfeiting, moreover, for every offence, the sum of fifty pounds current money, upon conviction thereof by indictment," &c. And the *third section* declares, "that if any tavern-keeper shall permit any E O, A B C, L S D, or Faro Table, or other device, to be set up, kept or played, in his or her tavern, out-house, or place appertaining or near to the same, his or her licence, upon conviction thereof, shall be void, to all intents and purposes." He also referred to the act of 1803, *ch.* 75, to shew the construction given by the legislature to the act of 1797, *ch.* 110.

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Scott, for the State.

Chase, Ch. J. delivered the opinion of the court, declaring that the act of 1797, *ch.* 110, only applied to dwelling-houses, out-houses, and places occupied by tavern-keepers, &c. No opinion was given as to the question whether or not the court below were right in refusing to permit the counsel for the traverser to argue to the jury upon the construction which they had given to the act of assembly, in their direction to the jury, on the prayer which was made by counsel. The chief judge said he was prepared to give his opinion that the counsel had no such right, after he had called upon the court to give a construction to the act, and the court had done so.

JUDGMENT REVERSED.

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December.

After a *fieri facias* has been laid, and before a sale of the property seized thereunder, a writ of error, (bond with surety having been approved) does not operate to stay further proceedings under the *fieri facias*.

In this case a writ of *fieri facias* issued on the 7th of April 1806, on a judgment rendered in the late general court, at October term 1805, returnable to this court in June last. At which time the sheriff, to whom the writ was directed and delivered, returned the same to this court, endorsed thereon, that he did, on the 16th of April 1806, lay the same on the goods and lands of the defendant, but that he was prevented from making sale of the

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property by the production of a certificate that a writ of error had issued, (bond with security having been first given and approved,) on the 21st of April 1806. A motion was made on the part of the plaintiffs for a writ of *venditioni exponas*, which motion was continued until this term, when it was argued before CHASE, Ch. J. TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J.

Mason, for the motion, contended, that a writ of error was no *supersedeas* to a writ of *fieri facias* which had been laid previous to the issuing of the writ of error; that an execution was an entire thing, and when once begun, must be completed. In his argument he cited the act of 1715, *ch.* 4. *Charter vs. Peter*, *Cro. Eliz.* 597. *Moor*, 542, S. C. *Dyer*, 98, 99. *Sare vs. Shelton*, 2 *Roll. Abr.* 491, pl. 5. *Ibib* pl. 6. *Tocock vs. Honyman*, *Yelv.* 6. *Agges vs. Lenthall*, 3 *Keble*, 308. *Meriton vs. Stevens*, *Willes's Rep.* 273. *Baker vs. Bulstrode*, 1 *Vent.* 255. *The Queen vs. Nash*, 1 *Salk.* 147. 2 *Ld. Raym.* 990, S. C. *Perkins vs. Woollaston*, 1 *Salk.* 321. 6 *Mod.* 130, S. C. *Clerk vs. Withers*, 1 *Salk.* 323. 2 *Ld. Raym.* 1072, S. C. *Spurraway vs. Rogers*, 12 *Mod.* 501. *Bac. Ab.* tit. *Error*, (H.) *Ibib.* tit. *Supersedeas*, (G.) (D. 5.) (E.) (D. 4.) *Cooper vs. Chitty*, 1 *W. Blk. Rep.* 67. 1 *Burr.* 21, S. C. *Rorke vs. Dayrell*, 4 *T. R.* 411. *Sampson vs. Brown*, 2 *East*, 489. *Gilb. on Executions*, 22, 23. *Imp. Sheriff*, 154, 155; and the *Stat.* 5 *Geo. II*, *ch.* 7.

Martin, against the motion, relied on *The State vs. Page, et al.* 1 *Harr. & Johns.* 475. The acts of 1715, *ch.* 4, and 1799, *ch.* 79, *s.* 10. He referred to and commented on the cases, cited in favour of the motion. Also *Mudd vs. Warren*, 3 *Keble*, 174. *The Complete Sheriff*, 270. *Yelv.* 44. *Lane vs. Bachurst*, 2 *T. R.* 44. The acts of 1715, *ch.* 33, *s.* 4; 1732, *ch.* 22; 1791, *ch.* 67, *s.* 4. 3 *Danvers*, 320, pl. 4. *Levett vs. Perry*, 5 *T. R.* 669. *Meagher vs. Vandyck*, 2 *Bos. & Pull.* 370; and *Incledon vs. Clarke*, *Barnes*, 212.

CHASE, Ch. J. It is contended that a writ of error, with bond filed according to act of assembly, after *seizure* of goods on a *fieri facias*, but *before sale*, is no *supersedeas*; and two positions are laid down in support of this doctrine:—

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First, That an execution is an entire thing, and when once begun cannot be stopped.

Second, That the property is changed or altered by the seizure of goods on a *fieri facias*.

On these two positions the argument rests.

1. As to the first position—In a *ca. sa.* I shall admit it, because there is but one single act to be done, and as soon as that is done, the execution is completed and executed—the arrest of the defendant, who is detained in custody to compel payment of the money; and if the *supersedeas* comes after the arrest, it is too late, the execution being executed.

As to a *fieri facias* the position is not supportable in the extent contended for, but is subject to modification.

A *fieri facias* begun by one sheriff must be finished by him or his executors; if out of office, he shall be compelled by a *distringas* to sell the goods, and pay over the money to the plaintiff, and so of his executors.

After seizure of goods on a *fieri facias*, the death of the plaintiff will not prevent the sheriff's going on with the execution; but he may sell the goods, and bring the money into court, which will be paid over to the executor. The death of the defendant after the seizure, will not prevent the sheriff from going on with the execution. These are the only instances in which an execution (a *fieri facias)* is an entire thing, according to the decisions of the courts.

There are four essential acts necessary to be done to perfect the execution of a *fieri facias*, in order to divest the property of personal chattels out of the defendant, and transfer them to another. 1. Seizure of the goods by the sheriff. 2. The appraisement. 3. Public notice of the sale. 4. The sale of the goods by the sheriff after public notice.

In the case of land, another requisite must be complied with to vest the legal estate in the vendee—a deed from the sheriff to him.

The return of the *fieri facias* is necessary for the purpose of ascertaining the sum made by the sale of the goods, to lay the foundation for a second *fieri facias*, in case the sum made should be incompetent to the discharge of the debt and costs; or if there was a surplus in the hands of the sheriff, after payment of the debt and costs, to enable the defendant to proceed against the sheriff, in a summary way, to compel payment of the surplus to him.

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As to the first—The seizure of the goods by the sheriff. The sheriff by the seizure acquires a special property in the goods to preserve them, subject to the execution, and can maintain trespass or trover for them against wrong doers; they are in *custodia legis*, to be disposed of by the sheriff according to law.

The general property is not in the sheriff, because he has a special or qualified property in contradistinction to the general: and because he cannot retain them at an appraised value and pay the money to the plaintiff.

The general property is not in the plaintiff, because the sheriff cannot deliver them to him at an appraised value in satisfaction of his debt. The question occurs, where is the general property? It is in the defendant, or in *abeyance* in contemplation or intendment of law, and will vest in future where the law directs.

It is said that by the seizure of the goods on a *fieri facias*, the defendant is discharged. I admit the position subject to one restriction, if not more. He is discharged *pro tanto*, that is, to the value of the goods seized. How is that value to be ascertained, and what is the true and legal criterion of it? Not the appraisement, but the price obtained on a public sale:—and the discharge of the defendant is only to that amount, which cannot be ascertained but by the sale and the return of the *fieri facias*. To elucidate it—suppose a *fieri facias* issues for $500, and the sheriff returns, laid as per schedule, and made to the amount of $100, what is the discharge of the defendant? Only *pro tanto*, the $100, and this return lays the foundation for a second *fieri facias* to recover the residue of the debt.

As soon as the sale is made, the general property, which was before in the defendant or in *abeyance*, is transferred to the vendee by operation of law, and he becomes the absolute owner of the goods.

If on a writ of error the judgment should be reversed after sale made, the property will not be divested out of the vendee, and revest in the defendant below, because the property vested in the vendee by operation of law, according to the legal course of proceeding in the administration of justice. But if the judgment should be reversed, after seizure and before sale, the general property, if in *abeyance* by the seizure, will revert to the original defendant by

operation of law, and he is entitled to a writ of restitution to obtain the possession. So that it is plain the property is not changed by the seizure, but by the sale.

It is said that, if goods are taken on a *fieri facias* the defendant is discharged, and the plaintiff cannot issue another execution, or bring an action of debt on the judgment. I have already pointed out in what manner he is discharged, and shall admit the plaintiff cannot sue out another execution, or bring an action on the judgment, pending the *fieri facias*; and the reason is obvious, because it is presumed the sheriff has already taken goods enough to satisfy the debt, and it cannot be known but by the sale whether the goods taken are sufficient or not to discharge the debt; and therefore, during the pendency of the *fieri facias*, he is precluded from proceeding by another execution, or by action of debt on the judgment.

It is also said, if the sheriff takes goods on a *fieri facias*, and they are rescued or lost, the sheriff is responsible, and from thence it is inferred the defendant is discharged. I admit the position, but not the inference generally, because I have already stated my ideas of the nature of the discharge. The sheriff is answerable, because in the first instance put, he can summon the *posse comitatus* to aid him against the rescuers, and can bring suit against them. In the second, if they are lost, it is supposed to be owing to his negligence, and therefore he is answerable, and the recovery against the sheriff would be the measure of the defendant's discharge.

But suppose the sheriff takes a negro on a *fieri facias*, or goods, and the negro dies the next day, or the goods are consumed in the sheriff's house, with his own goods, before he has time to sell them, would the sheriff be liable without any fault or negligence imputable to him? If not, this would constitute another limitation on the position that the defendant is discharged by the seizure on a *fieri facias*.

2. Having premised thus much, I will now refer to the decisions which I consider as supporting the doctrine, that there is no change of the property of the goods taken on a *fieri facias* until the sale is made by the sheriff, and that the *fieri facias*, until the sale is made, is not *executed*, and consequently that a writ of error is a *supersedeas* at any time before the sale.

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If sheriff levy goods on a *fieri facias*, and return on hand for want of buyers, the property is in the defendant. 1 *Bro.* 41, (6 *James* I.) A writ of error is a *supersedeas* if the sheriff receives it before sale, because the property is not altered. *Roll. Ab.* 491, *pl.* 5. (17 *James* I.) This case was decided fourteen years after the statute of the third of *James* requiring bail, and is the second case which was decided. The reason, because the property is not altered; and I add, because the execution was not executed before the sale. The sale is the most material part of the execution, because it ascertains the value of the goods, the amount for which the defendant is discharged, divests the property out of the defendant, and vests it in the vendee. 3 *Keb.* 169, *pl.* 4, (25 *Car.* II.) *Yel.* 44. By the seizure of the goods the owner's property is not altered, for the seizure is not any execution, but only the beginning of it. The sheriff after such seizure ought to return the writ executed *in tanto*, and cannot by law deliver them *in pais* to the plaintiff. *Yel.* 44. If the sheriff returns *nulla bona* on a *fieri facias*, and there is a recovery against him for a *false return*, that vests no property of the goods in him, but they remain in the party, and are liable to any subsequent execution for his debt. 2 *Vern.* 238, 9. If the sheriff on a *fieri facias levies the goods* and pays the plaintiff with his own proper money, yet he cannot keep the goods to his own use, for the authority by which he acted was to *sell the goods*. *Noy*, 107. Where a writ of *fieri facias* is delivered to the sheriff to-day, and another to-morrow, and the sheriff *executes* the last first, by *making sale* of the goods, such sale will stand good, and the vendee shall hold the goods against him who first delivered the writ to the sheriff. *Smallcomb vs. Buckingham, et al. Carthew*, 420. (9 *Wm.* III.) 2 *Bac. Ab.* 356, *per Holt*, Ch. J. The sale is the execution of the writ of *fieri facias*: the sale transfers the property. *Vide* the case of *Rylot vs. Pupham*, (19 *Geo.* III.) 1 *Term Reports*, 731, *(note.)* Neither before the statute of frauds, nor since, is the property of the goods *altered*, but continues in the *defendant* till the execution executed. 2 *Eq. Ab.* 381, *per* Lord *Harkwicke*. So long as the execution is *executable* but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards. 1 *Salk.* 321, 322. In the case of *Indedon vs. Clarke*, *Barnes's Notes*, 212, a question, whether after

bail perfected the goods can be restored? *Vide Meriton vs. Stevens*, (16 *Geo.* II.) *Sykes vs. Dawson*, (18 *Geo.* II.) Held, that if a defendant's person be taken by a *ca. sa.* and bail in error afterwards, the person shall be discharged; but in case of a *fieri facias*, the proceedings so far as the sheriff hath gone must stand. 2 *Cromp.* 353, 354. An *elegit* executed on goods only is not a *fieri facias*, for a *fieri facias* is *executed by sale* by the sheriff; but the *elegit* by appraisement of the goods by a jury and delivery to the party. 2 *Bac. Ab.* 349, *(note b.)* According to the statute of frauds and perjuries the writ of *fieri facias*, first delivered to the sheriff, is entitled to the priority; but if the goods are seized and sold under the second *fieri facias*, the goods are protected in the hands of the vendee; but if before sale they are seized under the first *fieri facias*, the sheriff may and ought to sell them on the first *fieri facias*, and pay the money to the plaintiff in that case. 1 *Term Reports*, 729. This decision contradicts the two positions relied on to prove that the writ of error is no *supersedeas* after seizure. 1st. That the execution is an entire thing and cannot be stopped or suspended. 2d. That the property is changed by the seizure. In this case the goods were *first seized* on the *second fieri facias;* they were afterwards *seized and sold* on the *first fieri facias*, and the sale adjudged good, and the money paid over accordingly. Any time before a sale the sheriff has a right to give the preference to that *fieri facias* which by law is entitled to the priority. If the property of the goods was divested out of the defendant by the *seizure* on the second *fieri facias*, the sheriff could not have laid the first *fieri facias* on them, because they were not the property of the defendant; but he did seize them, and sell them on the first *fieri facias after* the seizure on the second *fieri facias*. *Vide* the Rule, and Judge *Buller's* opinion. In this case, *Cro. Eliz.* 597, and *Salk.* 322, were cited and relied on by the counsel who contended for the Rule.

If this case is considered on the act of 1713, *ch.* 4, independent of the *English* authorities, I think it is plain the writ of error is a *supersedeas* at any time before sale; and that such exposition is agreeable to the intention of the legislature and in furtherance of justice. In expounding the act of 1713 relating to appeals and writs of error, we must consider the evils which existed before, and the remedy provided for them, and give such an exposition to

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the act as will remove the evils and advance the remedy.

A writ of error, before the act of assembly being a *supersedeas*, the plaintiff sometimes lost his debt by the defendant's wasting his goods, or becoming insolvent, before the judgment was affirmed. To remedy this evil, bond, with security in double the sum recovered was required, before a writ of error was a *supersedeas*. This was thought by the legislature a sufficient security for the debt and damages in case the judgment should be affirmed.

In this manner the evil on the part of the plaintiff was fully removed.

The evil on the part of the defendant was, that his person might be detained in prison, or his property sold, before it could be ascertained whether the judgment below was erroneous or not. And further, in case the judgment was erroneous, and reversed, he might lose his property by the sale of the sheriff, and payment of the money to the plaintiff, if he should become insolvent before the judgment was reversed, or before the money could be recovered back.

If bond is given in the manner prescribed by the act of assembly, the writ of error will stay the issuing of the execution if it had not previously issued, or will delay or suspend the further progress by the sheriff in the execution of it, if it was not executed when the bond was filed.

The writ of error bond being in the penalty of double the sum recovered, with two securities approved by the chancellor, was deemed by the legislature ample security for the debt, interest, damages and costs, of the plaintiff, in case the judgment should be affirmed. This is all the plaintiff was entitled to by law; this is all he could in justice require, and for this he has ample security, independent of the defendant's property.

If the property is of a perishable nature, subject to natural decay, the fly or weavel, or casualties of any kind, the plaintiff cannot be injured by its remaining in the custody of the law to be operated on according to the decision of the appellate court; by which it is to be ascertained whether the judgment below is erroneous, and whether the defendant is indebted to the plaintiff or not.

But suppose the court should decide the writ of error is no *supersedeas* after seizure of the goods or lands, and the

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sheriff proceeds to make sale, and does sell, and the money is paid over by the sheriff to the plaintiff, and after all this is done the judgment is reversed, and the plaintiff becomes insolvent, or he pays the money over to one of his creditors, and becomes insolvent before a recovery over can be had, what is the situation of the defendant? He is deprived of his goods and his land, although he owed nothing, and he is without remedy. But suppose the plaintiff does not become insolvent, the defendant loses his land, and must bring suit for the money, which in most cases is not more than half the value of the land, because sold at a sheriff's sale for cash.

It was the intention of the legislature to prevent the defendant's being injured by a sale of his property while the writ of error was depending, and he was allowed to interpose his bond, (which was deemed an ample security,) to prevent the sale of his property.

No injury can be done the plaintiff by deciding that the writ of error is a *supersedeas* at any time before sale, because he has ample security for his debt and costs, and he will be fully compensated for the detention of the debt by the damages awarded by the court of appeals. But by a contrary decision, a defendant may be deprived of his goods or lands, or both, and be without remedy, if the judgment should be reversed. The former corresponds with a sound and liberal exposition of the act, is agreeable to the intention of the legislature, and will conduce to the advancement of justice, and therefore ought to be adopted.

If it should be determined that the writ of error is no *supersedeas* after seizure and before sale, the plaintiff will lose the benefit of the writ of error bond, and cannot resort to it in case there should not be enough levied to satisfy the debt, damages and costs,

Buchanan, J. *(a.)* The case is this—A judgment was rendered against the defendant, in favour of the plaintiffs, in the late general court, upon which judgment a *fieri facias* issued, returnable to this court, and the sheriff, to whom it was directed, laid the same on the real and personal property of the defendant on the 16th of April 1806, and on the 21st of April 1806, an appeal bond was filed, and writ of error issued, a certificate of which being shewn to the sheriff, he made return on the *fieri facias* to this court,

(a.) *Tilghman* J concurred with a majority of the court, but he was not present when the judges delivered their opinions.

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"laid as per schedule, and staid by writ of error;" and the application to the court now is, to award a *venditioni exponas*.

It is contended that the court are not competent to award a *venditioni exponas*, because, as it is said, the writ of error is a *supersedeas*: and the case in 2 *Rol. Ab.* 491, *pl.* 5, has been relied on in support of this position: but that case, by going too far, defeats itself: for it is there said, that the property shall be returned to the defendant, which has not been considered or adjudged to be law; and the reason assigned in support of the *dictum* being untrue, if it does not defeat the position, it at least weakens the authority. That the defendant is not entitled to a restitution of the property, seems to be a position not controverted, and is, I believe, admitted by our brother, the chief judge; nor indeed can it now be a question, for the current of authorities, both before and since *Rolle*, are to the contrary, with this exception, that when the goods are *taken* after the point of time from which the writ of error operates as a *supersedeas*, the seizure is irregular, and for irregularity in the execution, the goods shall be returned: but in no case, except where the execution is irregular, shall the defendant be entitled to a restitution of property. And in the case before us, the goods were taken before the writ of error issued, the seizure therefore was regular and lawful, and not within the exception.

But it has been said, that although the defendant is not entitled to a return of the property, yet the goods shall remain in the condition in which they were found by the writ of error; that is to say, not to be sold, but to continue in the sheriff's hands during the pendency of the writ of error; and in support of this opinion the case of *Ineledon vs. Clarke*, in *Barnes's Notes*, has been cited, in which it is said, that where goods are taken under a *fieri facias*, and bail in error afterwards perfected, the proceedings, so far as the sheriff has gone, shall stand; but I do not understand that case to mean, that the goods shall remain in the sheriff's hands until the ultimate determination of the suit in error; on the contrary, I take the true exposition and meaning of the case to be, that the execution being begun, by seizure of the goods, the property is placed without the control of the writ of error, and a *supersedeas* cannot reach it; and indeed the reason of the case is opposed

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to any other construction. Writs of error are too frequently resorted to for purposes of delay only; and if a writ of error issued after property taken in execution, was a *supersedeas*, the inconvenience resulting to creditors would be very great, for no defendant would ever sue out his writ of error, until the sheriff had proceeded on the execution; and though the plaintiff should delay his execution to the latest practicable period, the defendant would be as backward with his writ of error; a practice which would prove very vexatious to creditors, and the contrary position can be attended with no inconvenience or loss to defendants; for if they have merits, and in truth wish to take their cases to a superior tribunal, for good cause, it is at all times in their power to do so, before any proceedings are had under the judgments below. But it is said, that if a writ of error, issued after property taken under a *fieri facias*, is no *supersedeas* as to the sale, it would work great hardships to defendants in cases in which the judgments below should be reversed; but that cannot be deemed a hardship which a defendant draws upon himself by his own negligence; and if it is an inconvenience, it is one of his own seeking; it is an inconvenience to which, in a controverted case, he need never be subjected, and which, in cases of removal for delay only, he deserves to suffer, and none but himself should suffer by his laches, which might not be the case if the goods were to be arrested in the sheriff's hands to abide the suit in error; for, though the defendant files his bond with sureties, on suing the writ of error, yet it cannot be contended, that the plaintiff's security would not be lessened by a delay of the sale, until the suit in error was determined. The goods themselves are the best security a plaintiff can have, and if they were to be arrested in the hands of the sheriff until the affirmance of the judgment, not only they might perish, but the appellant, and his securities, might become insolvent, and the appellee be thus defeated of his just claim, so that the security of the plaintiff would certainly be lessened, and that by the intentional delay of the defendant. And in the case of personal property, it would be better for the defendant himself that it should be sold, than to lay in the hands of the sheriff, where there would be the greatest probability that part, if not all, would perish before an ultimate determination.

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The hardship attending defendants was much and ably dwelt upon in argument, as the question related to *goods* seized under a *fieri facias*: but it is admitted, and so are the authorities, that if a writ of error comes after the defendant is taken under a *ca. sa.* it is no *supersedeas*, and the defendant must lie in gaol until the suit in error is determined: and if the suggestion of hardship, is an argument to shew that a writ of error is a *supersedeas* as to sale of goods taken before, the argument applies much more forcibly to the situation of the defendant himself, who is in gaol under the *ca. sa.* for certainly, it is harder to be confined in a prison, than to have goods sold under execution; but this argument of hardship has never prevailed in the case of a seizure of the person under a *ca. sa.* as appears by all the books, and surely then it ought not to prevail where it applies with less force. When a defendant will not sue out his writ of error, before his goods are seized under a *fi. fa.* it affords a strong presumption that his object is delay only, to which as little encouragement should be given as consistently with the strictest principles of law can be; and so much have courts leaned against such practices, that in the case *Masterman vs. Grant*, 5 *Term Rep.* 714, the court refused to stay proceedings, the plaintiff in error having declared that he brought the writ of error for delay.

The property in goods taken by a sheriff under a *fi. fa.* becomes altered by the seizure, by authority of law, for all the purposes intended by the writ; and therefore it is, that a writ of error which comes afterwards, is not a *supersedeas*; for the writ of *fi. fa.* may, by the seizure, be said to be gratified, since the sheriff, without making any return thereof, may sell the goods, and satisfy the judgment. It is said in 1 *Brownlow*, 41, "that if the sheriff takes goods under *fi. fa.* and returns that they are in his hands for the want of buyers, the property *remains* in the defendant;" yet such is the current of authorities to the contrary, that I cannot yield to that position, if by it is meant that the *property* is not altered; and the writer may have intended to attempt a distinction between the property being *altered*, and *divested* out of the defendant. There is a case also in 2 *Equity Cases Ab.* 381, referred to in the argument, in which it is said, that neither before nor since the statute, (by which the property is only bound by the delivery of the

writ to the sheriff,) is the property of the goods altered, but continues in the defendant until execution executed. But I do not consider that case as an authority against me, on the contrary, I view it as an authority in support of the position I have taken. The question in that case did not arise on *the effect of the seizure by the sheriff*, but *of delivery of the writ to the sheriff*. Before the statute the goods were held to be bound from the teste of the writ, but by the statute from the delivery of the writ to the sheriff; and Lord *Hardwicke* meant to say no more, than, that although the goods were bound, yet the property was not thereby altered until seizure by the sheriff; and probably by the expression "execution executed," he intended no more than *a taking under a fi. fa.* or he may, (under the idea of an execution being an entire thing,) have meant that by the taking, an execution becomes executed; and the same language is used in the case *Meager vs. Vandych*, in 2 *Bosanquet and Puller*, 370, where the taking of goods by *fi. fa.* is called the execution of the writ.

The property, by seizure, is altered for all the purposes of the execution, and thus is placed out of the reach of a *supersedeas* on writ of error. If the sheriff after seizure dies, his executor may sell; after he ceases to be sheriff he may sell; if the plaintiff or defendant, or both, should die after seizure, he may sell, and he may sustain an action for the goods against a stranger, or even against the defendant himself, if he takes or destroys them. In short, the authorities are so numerous and unequivocal in support of this position, that all reasoning on the subject seems to be shut up. Lord Chief Justice *Willes*, in deciding the case, *Merriton vs. Stevens*, *page* 281 of his reports, says, (in speaking of the case in 2 *Rolle's Ab.* 491,) very laconically, (which shews that the principle was then well settled,) "the reason not being a true one, I give no credit to this case." And the reason assigned by *Rolle* is, that the property is not altered by the seizure. And *Gilbert*, in his treatise on executions, not by quotations from other authors, and without reference to any, but as a text, lays it down as established law, as an undeniable principle, that the property in the goods is altered by seizure, and the sheriff may sell notwithstanding *supersedeas* comes afterwards, and if he does not the court will award a *venditioni exponas*. The same position is also laid down in *Impey's*

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Sheriff. both books of very high authority: and it cannot be presumed that the question was not fully settled when they wrote. It is a general and a true position, that a defendant is discharged by the seizure of goods under *fi. fa.* so far as the goods taken will go; and so far the judgment, as between the plaintiff and defendant, is in effect satisfied, and the debt discharged, and being so satisfied, there is nothing for a *supersedeas* to operate upon, or in other words nothing to be superseded; and hence it is, that a writ of error can in no way affect goods already taken; for it would be idle to say, that a writ of error, (which is issued to review the proceedings in the court below, and to prevent a judgment being satisfied before such review,) shall operate as a *supersedeas* to that end, after the judgment, so far as concerns the defendant, is actually satisfied; for the office of a *supersedeas* is not to undo what is done, but to prevent further proceedings; therefore, if goods only to part of the amount of the judgment be taken before the writ of error issues, it does not undo what is done, but shall be a *supersedeas* as to the taking of any other goods. On these grounds, if there were no adjudications on the subject, and the question was now to be decided, I should be of opinion that the writ of error in this case is not a *supersedeas*. But the authorities, independent of any reasoning, are not to be combated. An execution is said in the books to be an entire thing, and when once begun cannot be stopped or superseded. But the different writers have not very clearly explained their *meaning* of the entirety of an execution, though they all, except *Rolle*, agree in this, that when once begun it cannot be superseded. The writ of *fi. fa.* commands the sheriff that of the goods, &c. of the defendant, he cause to be made the debt, &c. The making of the debt is the thing to be done, and the seizing of the goods, the sale, &c. are but the manner, and, as between the plaintiff and defendant, the debt is in effect made by the seizure, so far as the goods will go; or the execution may be said to be an entire thing in this, that after seizure, the appraisement, notice and sale, are matters of course, and incident to the office of sheriff; and when done, have relation back to the original taking, and thus by fiction of law, arising out of the doctrine of relations, it becomes an entire thing—as is the case in several kinds of conveyances; for instance, by fine or common recovery; and also

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in the common case of a grant, which issues as a matter of course, (all requisites having been previously complied with,) and relates back to the certificate, and thus makes it one entire conveyance. But the entirety of an execution has been denied, and in contravention of the principle, the case of *Hutchinson vs. Johnson*, reported in 1 *Term Rep.* 729, has been cited and relied on, though I cannot conceive how the decision in that case in any way affects the question. The decision is, that where two executions come to the hands of a sheriff, though he seizes the goods by virtue of that which was last delivered, yet he may and ought to apply them to the discharge of that which was first received, because the goods were bound by the delivery of the first; but the court also said, that if the sheriff in such case actually sells under the second execution, the sale shall stand good, and the person claiming under the first execution shall have his remedy against the sheriff; and this last position, under the statute of frauds, for the benefit and quiet of innocent and *bona fide* purchasers. But this case does not at all deny the entirety of the execution, but is grounded on the principle that the goods being bound by the delivery of the first writ, the seizure under the second was altogether irregular. And in *Carthew's Rep.* 420, the case of *Smalcomb vs. Buckingham*, the same principle in favour of a purchaser is decided. The authorities in support of the principle, that a writ of error after goods taken under a *fi. fa.* is no *supersedeas*, but that the sheriff shall go on to sell, are very numerous, and some of those which are most in point, and by which the principle seems to be so firmly established as not now to be shaken by any artificial reasoning, I will take a short view of, as this is a case depending upon authorities.

The first of them in order of time is the case of *Charter vs. Peeter*, in *Cro. Eliz.* 597, in which case the sheriff took the defendant's goods by a *fi. fa.* but before sale a writ of error and *supersedeas* came, whereupon the sheriff made return that he had seized the goods, but that they were in his hands *pro defectu emptorum*, and also that a *supersedeas* was awarded; and on a motion for a return of property, the court denied a restitution, and awarded a *venditioni exponas*, because the execution was begun by the seizure; and a case in *Dyer*, 98, to the same effect. In *Moor*, 542, it is laid down, that if the sheriff has the goods

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of the defendant in his hands under a *fi. fa.* and a *supersedeas* comes, he shall not deliver them, but shall sell them, because the beginning of the execution was before the *supersedeas* came, and the execution being entire shall not be divided. In the case *Tacok vs. Honyman*, in *Yelv.* 6, it is held, that if a writ of error and *supersedeas* come to the sheriff after goods taken, he shall proceed to sell what he has taken, but shall levy no more. And in the case of *Baker vs. Bulstrode*, 1 *Ventris*, 235, it is decided, that if the sheriff takes goods by *fi. fa.* before writ of error, the execution is not to be undone by writ of error afterwards, though at the time the writ of error comes the goods may be on hand for want of buyers. But it is argued, that these cases were all decided before the statute requiring bail in error, and that after the statute the principle before established by them ceased to be law; and in support of this position the case in 2 *Rol. Ab.* 491, which was after the statute, is relied on; and this is the only case I have seen either before or since the statute to the contrary. And it is worthy of remark, that security or bail in error being required by the statute, is not given as the reason of the doctrine laid down in *Rolle*, nor does it appear that the statute in that case was considered as working any new principle, but the reason assigned is, because the property is not altered by the seizure. This, Lord Chief Justice *Willes* says, is not a true reason, and in that he is supported by the later and very respectable authorities. In the case, *Rocke vs. Dayrell*, reported in 4 *Term Reports*, 411, Lord *Kenyon*, speaking of the writ of *fi. fa.* thus expresses himself—"As the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the Crown can attach;" a much stronger case, if it is law, than that of actual seizure.

In the case, *Clarke vs. Withers*, reported in *Salk.* 322, 3, and 2 *Lord Raymond*, 1072, these points were solemnly adjudged by the whole court, but particularly by *Holt*, Chief Justice, and *Gould*, Justice—That a seizure of goods in execution is a discharge of the judgment; that the substantial part of the execution is the seizure, and that the rest is all form; that an execution is an entire thing, and not to be superseded after it is begun, and that the sheriff after seizure, (as a matter incident and of course,) is bound to

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sell; that after seizure the judgment, (as to the defendant,) is discharged and satisfied; that by the seizure the sheriff gains a special property, and the property in the goods is divested out of the defendant; that the plaintiff has no farther remedy against the defendant, but must go against the sheriff; for the defendant having lost his goods, may (in an action brought upon the judgment,) plead levied by *fi. fa.* in bar, and it will be good. The same principle, as to the alteration of the property by seizure, is recognised and asserted in various other books of high authority, and particularly *Gilbert on Executions*, 23, and *Impey's Sheriff.* Let it be observed, that the only reason assigned in *Rolle*, why a writ of error is a *supersedeas* after seizure, is "that the property is not altered by the seizure," which is an implied admission, that if the property was altered, the writ of error would not be a *supersedeas*. And *Gilbert*, and the other writers say, that a writ of error after seizure is no *supersedeas*, because by the seizure the property is altered; hence it appears, that the question, whether the writ of error is a *supersedeas* or not, depends on the question whether the property is altered or not by seizure. And the case in *Rolle* appears in so questionable a shape, and is arrayed in so doubtful a reason, that it must sink in the current of authorities by which it is overwhelmed. But independent of this reasoning, there are many adjudged cases, (since the statute requiring bail in error, and since *Rolle*,) which fix the principle, that a writ of error after seizure is not a *supersedeas*; and this proves that in *England* the statute was not considered as affecting the case.

In the case, *Agers and Lenthal, in* 3 *Keb.* 308, 9, it is said, "that on *fi. fa.* and seizure, if no *supersedeas* comes before sale, it is good; and if error be mesne between seizure and sale, it doth not avoid it." The plain and obvious understanding of which is, that notwithstanding a *supersedeas* comes after seizure, yet the sheriff, having taken goods before, if he proceeds to sell, the sale shall be good; and as error cannot be mesne between seizure and sale, unless there be a sale after the writ of error, the latter branch of the opinion must mean, that the error does not avoid the sale; by which it is evident, that the writ of error coming after the seizure is no *supersedeas*, for if it was, the sale would be void. Lord *Mansfield*, in delivering the opinion of the court in the case, *Cooper vs. Chitty*, reported

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in 1 *Wm. Blackstone*, 65, 67, and 1 *Burrow*, 34, lays it down as a fixed principle, that a writ of error cannot supersede an execution, or a *fi. fa.* actually begun; and, as he says, for the plainest reasons, because the execution is entire, and if once lawfully begun must be completed; and because, as between the plaintiff and defendant, the debt is discharged by a seizure under *fi. fa.* In the case *The Queen vs. Nash*, reported in 2 *Lord Raym.* 989, the question arose on the effect of a *certiorari* to remove a conviction; which was brought after the constable had distrained the goods of *Nash* under a warrant from the justices to levy the penalty for deer stealing; and *Holt*, Chief Justice, in deciding the case, likened it to the case of goods taken under a *fi. fa.* before writ of error brought, and there laid it down, (not as a case of first impression and then to be decided, but as the known and acknowledged law of the land.) that when goods are taken under a *fi. fa.* and then a writ of error comes, it is no *supersedeas*, but the sheriff shall proceed to sell, and if he does not, a *venditioni exponas* may be awarded. And so fully is the principle established in *England*, that in the case, *Merriton vs. Stevens*, in *Willes Rep.* 271, Serjeant *Wynn*, who argued in support of the rule to set aside the *fi. fa.* admitted, that if the sheriff had taken the goods before sealing of the writ of error, he might have proceeded to sell them afterwards. Thus, then, it appears by all the authorities, except *Rolle*, (both before and since the statute requiring bail in error,) that a writ of error which issues after goods are seized under a *fi. fa.* is not a *supersedeas*. And indeed the case in *Rolle* may be reconciled with the other decisions; for in the case, *Sampson vs. Brown*, reported in 2 *East*, 439, 444, it is said, that the *supersedeas* issued after the writ of error upon which it was grounded, so that, although the *supersedeas* came after the goods were taken, yet the writ of error might, (for any thing appearing in the case,) have been issued and allowed before, and the *supersedeas* having relation back, the taking of the goods was irregular. The case is very short, and by no means full. As to the entirety of an execution, if it should be admitted to be a doctrine established on artificial reasoning, yet it is an established principle, and, (like many others supported only by the same kind of reasoning,) it cannot now be shaken, without overthrowing every authority upon the subject, for

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more than a century past. We have seen that by the common law, a writ of error, which (if taken out in time,) was a *supersedeas* without security, was not a *supersedeas* if sued out after goods taken under a *fi. fa.* We find also, that in *England* the statute which requires bail in error, has never been considered as altering the principle, or at all affecting the case, nor indeed could any such construction be given to the statute, which is in these words: "That no execution shall be stayed or delayed, upon or by any writ of error," &c. "unless," &c. Thus the statute does not give a writ of error any more efficacy than it had at common law, but on the contrary takes from it all the efficacy it had at common law as a *supersedeas*, unless it is accompanied by bail; and in fact makes it, with bail, what it was before without bail, and no more; and this being the uniform construction of the statute, not denied even by *Rolle* himself; for (as I have before observed, the case put by him is not attempted to be supported by authority of the statute, but by another reason which is not law,) the same construction must be given to the act of assembly 1713, *ch.* 4, regulating writs of error, &c. which is in the same words contained in the statute, and probably so far copied from the statute; and indeed the same construction has always been given to the act of assembly, and acquiesced in until lately. The case then is shut up. In *England* no question exists, nor would an argument be heard on the subject; and in this state the words of the act of assembly, and the act of parliament, being the same, they must receive the same construction, and our courts of law must be bound by the authorities, whatever artificial reasonings might be offered to the contrary. The old *supersedeas* law, and the practice which is said to have been pursued under that act, have been urged by counsel in argument, to shew the true construction of the act of 1713, *ch.* 4, but neither that act, nor the practice under it, (whatever that practice may have been,) has any bearing on the case; for when it is said that an execution is an entire thing, and cannot be superseded, it is intended by a *supersedeas* on writ of error, and not a *supersedeas* created by statute, or an *audita querela*, &c.

The cases which turn upon the point of time, from which a writ of error was held to operate as a *supersedeas*, relate to this case in no other manner than as they show, that at common law a writ of error, which issued after goods were

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seized under a *fi. fa.* was not a *supersedeas;* and in this case the writ of error, having issued after the goods were taken by the sheriff, it must receive the same construction which at common law it would have had, the act of assembly giving to writs of error as such, no greater efficacy than they had before; nor does the circumstance, that the *fi. fa.* in this case, was laid on lands as well as goods, make any difference; for by the act of Parliament, under which lands are held to be liable to execution for debt in this state, real and personal property are placed precisely on the same footing.

Upon the whole, I consider this not as a new case now to be determined, but one which has been settled ever since the reign of Queen *Elizabeth* and not shaken by any adjudged cases since, except that of *The State, use of Warder, vs. Page, et al.* which was determined contra in the eastern shore general court, by my brother the Chief Judge, whose opinions I very much respect, but to which I cannot yield in this case, being tied up by what must now be considered as the established law; and am therefore of opinion that a *venditioni exponas* ought to be awarded.

Nicholson, J. said, he had uniformly been of opinion, that it was improper for the court in the last resort, to assign their reasons for the final judgment. In the inferior court it was proper that they should give the reasons of their decision, because it afforded counsel an opportunity, when they came before the court of appeals, to shew the fallacy of the reasoning of the court below, if it was fallacious. He had therefore, on this account, always given the reasons of the court in which he presided. But here there was no necessity of that kind, because the decision of the court of appeals became the law of the land, whether that or their reasoning was or was not correct; and where the reasoning was bad, it was too often blended with the decision of the court, and considered likewise as the law. The impropriety of assigning reasons in the court of the last resort, he thought was strongly exemplified in this case. Two positions had been taken in the opinions given by two of the judges, which in his opinion did not belong to the case. These were, whether the seizure upon a *fieri facias* did or did not divest the property out of the defendant, and whether the defendant was thereby discharged. Upon

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these two points, he *might* agree with the presiding judge, *(Chase,)* although he differed with him in the result; and upon the same points he *might* differ with the other judge, *(Buchanan,)* although he agreed with him in the result. He wished it, therefore, to be distinctly understood, that he gave no opinion upon either of these points, except that they had no bearing whatever on the question submitted to the court.

He had been induced to decide, that a writ of error after seizure upon a *fieri facias* was no *supersedeas*, by a long train of decisions for more than two hundred and fifty years, (from the 1st year of Queen *Mary.)* A train of decisions prevailing for such a length of time, with the solitary exception of the case in *Rolle*, he considered equal to a statutory provision. The whole reasoning on the point *really* before the court, was given in three lines by Lord *Mansfield*, in the case in 1 *Wm. Blackstone's Reports*, 67, viz. *An execution being entire in its nature, and once begun, cannot be superseded by a writ of error, but must be completed, because the property is of a perishable nature, and is not to remain in the sheriff's hands to await the final determination of the suit.*

Gantt, J. This is a motion for a *venditioni exponas*, and the case is shortly this: A *fi. fa.* was regularly issued upon a judgment obtained in the late general court; this *fi. fa.* was regularly executed by a seizure of real and personal property. After seizure, the defendant filed a writ of error bond, and a writ of error accordingly issued, mesne the seizure and sale of the property taken. The sheriff returns that the sale of the property is stayed by writ of error, and the motion for a *venditioni exponas* is founded upon this return.

I was absent on the first day of the argument of this motion; but have been furnished with a list of the authorities cited by the counsel. I have reflected upon the case, both before and since the argument, and have referred to the authorities cited—and as I concur with the majority of the court, I will, in as brief a manner as the case admits of, give my opinion, and the principal reasons which govern my decision.

I shall not pursue the various cases which have been cited in order, or particularly comment upon them. I con-

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sider it a waste of time, and useless trouble: almost the whole of them are founded upon one of these questions—whether a writ of error is a *supersedeas* from the *teste* or *allowance* of the writ or *notice* of its execution; whether the execution has been regularly issued, or served, or according to the rules of practice established by the courts in *Great Britain* for putting in bail on writs of error under the statute?

Decisions, founded upon either of these principles, do not apply to the present case. The sole question is, whether this writ of error operates as a *supersedeas* to stay a sale of the property taken under the *fi. fa.* regularly issued and executed by seizure, before the writ of error issued? In other words, whether the plaintiffs are entitled in law to a writ of *venditioni exponas* to compel the sheriff to sell that property?

The statute of *James*, and the act of assembly *quo ad* the subject of inquiry, are in my opinion exactly similar. I will dispose of them first, and then advert to those principles of the common law which govern this question. The statute of *James* was meant to correct the abuse of writs of error issued for delay, and to remedy a defect of the common law, which entitled a party to this writ, without giving the plaintiff security. Its effect was to destroy the *implied supersedeas* of a writ of error, unless security was given. Cases daily occur of issuing writs of error without giving security, and the only difference between such writs at this time and before the statute or act of assembly is, that it does not, at this time, supersede an execution, formerly it did supersede it.

The act of assembly prescribes a different mode for taking the security than the one prescribed by the statute, but makes no further change of the common law in this respect.

Neither the statute, nor the act of assembly, deprives the plaintiff of any right, or destroys any property, interest or security, which either he or the sheriff had acquired. It extends not the legal operation of that writ, nor does its effect reach farther since the statute than it did before, when no security was given. It supersedes nothing since, which it did not supersede before; but takes away from the defendant that power which the common law gave him, of staying further proceedings on a judgment without

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any security at all—and this is the whole extent of the statute and act of assembly, as far as relates to the present subject.

No case has been cited, and none can be quoted, shewing, that by the statute or act of assembly, a more extensive effect or operation has been given to the *supersedeas itself*, than what it had at common law—none of the cases cited hinge on this principle.

At common law a *fi. fa.* charged only goods and chattels. In this state lands also, in which the defendant *has any legal* estate for his own use, may be taken under this process; and being equally liable to seizure, that species of property becomes, of course, equally liable to the same rules and principles which govern the other; I mean as to the seizure, and as to the power of selling, and also as to the alteration of property, but subject to a difference as to the time and manner of selling it. A sheriff may maintain actions for injuries done to the one as well as for the other species of property, according to the nature of the injury, and the qualified interest which he has.

At common law a *fi. fa.* charged the defendant's goods from the *teste of the writ*—a writ of error, therefore, operating as a *supersedeas*, would destroy this charge, if there had been no seizure, *not expressly* so, but by legal implication and consequence. But if the sheriff had seized goods under a *fi. fa.* he thereby acquired a property in them—To what extent or purpose? *For the purpose of selling them, and of having the money in the court to pay to the plaintiff.* (*Gilb.* 15. &c.) This property of course was not absolute, *but qualified.* It was co-extensive with this object and purpose; and only extended thus far, and no farther. Some authorities say, that by the seizure the defendant's property *was divested*—'tis true, it was so, but not absolutely. The expression must be construed with reference to the subject and nature of the case; that is, as far as the teste of the writ or seizure of the goods had vested a right or property in the sheriff or the plaintiff—so far, and no farther, was the defendant's property in them destroyed. What was the purpose of the law in vesting the property in the sheriff, or in charging the goods from the teste, and afterwards by statute, from the delivery of the *fi. fa.* to the sheriff? In the first place, to prevent the defendant from fraudulently selling or wasting them;

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and secondly, for the purpose of the sheriff selling them, and having the money in court. Therefore, *eo instanti* that the purpose of the law was gratified, the residue of the goods were exonerated and belonged to the defendant, whether they had been seized or not. The property which the sheriff had acquired thereby, ceased; the liability to pay the plaintiff was exonerated, and the defendant's ownership once more became complete. While the sheriff's property continued he might maintain trover or trespass; and till a sale, the defendant might lawfully, in my judgment, contract for the sale of, or *will the goods, subject to the charge which the law had imposed on them.* Now the sheriff had a qualified interest in the goods; the defendant had a qualified interest also; and these qualified interests together, composed a full and absolute ownership; each party, therefore, had a property in the goods. If the sheriff died, his executors had his property in them, subject to the *legal purpose* before mentioned. If the defendant died, his executors had his interest. The power which the sheriff had of selling, when exercised, ultimately determined the qualified interest of each, and vested the absolute ownership in the purchaser. After the legal purpose was answered, the residue of the goods belonged to the defendant, or his assigns, as the lien or charge on the goods, or the property divested out of the defendant had ceased, or was destroyed as to such a residue.

Let us now consider the nature of a writ of error, viz. its object and its effects.

First, as to the object. It is to remove the record and proceedings of an inferior tribunal to a superior one, to review that record, and reverse the judgment of the inferior court if it is erroneous; and the record must of course be the only subject of inquiry, for the suggestion upon which the writ issues is, that in the record and proceedings there is error.

It removes the record and proceedings. If no *fi. fa.* or *ca. sa.* has issued, then by *legal implication* this writ of error operates further, it suspends the power of the inferior court to issue a *fi. fa.* for the record is considered, in law, as removed *eo instanti* that the writ operates; therefore there is no foundation for the inferior court to issue a *fi. fa.* as it can only be grounded on a *judgment in the court* which issues it, and the judgment is removed with

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the proceedings. Hence the doctrine of contempt in the inferior court in issuing the *fi. fa.* or the sheriff in serving it after such writ of error; and hence the doctrine of executions irregularly issued.

But if the *fi. fa.* has issued, and is not served, the sheriff has no authority to levy it for the same reason; because by *legal implication* the power and authority of the inferior court is superseded; and as the sheriff derives his authority from the court, and although the writ of *fi. fa.* issued while the court had the power to issue it, yet, as before the sheriff had levied the *fi. fa.* the power of the court had terminated by legal inference and intendment, the sheriff, if he does serve the *fi. fa.* acts without authority, the writ of error surceasing all proceedings. Hence the doctrine of contempt in the sheriff if he does afterwards serve the execution; and hence also the *legal implication* which makes the writ of error operate as a writ of restitution of the goods thus taken in execution; because the sheriff had no authority at the time to levy it, and his seizure for that reason was *irregular.*

But if the *fi. fa.* or *ca. sa.* has been served—if the goods or body of a defendant has been taken in execution, then the common law writ of error does not supersede the execution thus executed; for it is a principle of law, that an execution is an entire thing, and once begun must be completed. If a *fi. fa.* is levied, it is as much the duty of the sheriff to sell the goods, and raise the money, as it is his duty, if he has arrested the defendant on a *ca. sa.* to imprison him till he pays the money. The seizure of goods, and the arrest of the body, are the principals, the selling of the goods, or imprisoning the body, are the incidents. Now, if a writ of error will supersede the sale after a seizure of the goods under a *fi. fa.* why not the imprisonment, after the arrest of the body, if it issued *mesne* the occurrence of the principal and of the incident?

After seizure of the goods or arrest, the whole object of the judgment and execution is answered as it respects the plaintiff and defendant. The defendant is discharged from the judgment to the extent of the goods taken, and the plaintiff looks to the sheriff only for the amount; or if the body is arrested, it is a like satisfaction *quo ad hoc*; and if then the writ of error supersedes all further proceedings, it is only in the suit between the plaintiff and

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defendant, and by the seizure of the goods to the amount of the judgment, or *quo ad* the amount of the goods seized, or by the arrest of the body, all proceedings between the plaintiff and defendant are at an end, and there are no further proceedings to supersede.

This writ operates also as a writ of *restitution*, but only where an execution has *irregularly* issued, or been *irregularly* served. It does not operate as such where there is *no irregularity*, for then the very principle upon which it operates, as a writ of restitution, is wanting. The *irregularity* here meant is evidently determined and ascertained, by the time when the writ of error operated, either upon the power of the court itself to issue the *fi. fa.* or upon the power of the sheriff to execute the writ; his sale in such case is void.

The writ of error annuls no act or proceedings *regularly and legally done*. It leaves such acts in *statu quo*. A writ of restitution, if the judgment is reversed, issues of course. Now, if the writ of error itself is in all such cases to be considered as a writ of restitution, it is in effect issuing the writ of restitution before a judgment of reversal, which legally cannot issue till afterwards: that is, to give the remedy first for the injury alleged to have been done, and afterwards to determine whether the injury has been done or not.

The sheriff can maintain trespass or trover for injuries done the property in his possession, as sheriff, even if done by the defendant. If the writ of error is a restitution, as contended for, it avoids that possession or property, and consequently his right to sue for such injury. Suppose the defendant has committed such injury, and the sheriff had sued between the 16th and 21st of the month when this property was taken, it nonsuits the plaintiff, for his property was destroyed and overreached by the writ of error, and although his duty required he should protect the property, and sue for the injury done to it, yet the law, which requires and enjoins this duty, defeats the obligation it has created itself, and nonsuits the very action it has *virtually, by imposing* the duty, directed him to bring.

Other cases might easily be suggested, where similar violations of long established principles would arise from the construction of the legal operation of a writ of error, now contended for.

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But although I am for a *venditioni exponas* issuing in this case, I am not to be understood as saying that the court would not lay their hands upon some cases of a like application, where it evidently appeared that manifest injustice might be done. The money may be ordered to be brought into court, and await the event of the writ of error. This power should, however, be exercised, not upon the suggestions of possible cases, but upon cases where there exists well grounded apprehensions of such irreparable injury, unless this power of preventing it was resorted to. The circumstances, properly disclosed, in such instances, should be previously made manifest to the court. This power was exercised by the court in the case reported in *Willes*.

I have avoided, as I stated at first, any comments upon particular cases. Those which hinge either upon the irregularity of issuing the execution, upon the time when a writ of error began to operate, or upon the rules of court, founded upon the statute of *James*, I consider as not bearing upon this case.

I have, on more than one occasion, examined into the law upon this subject. The result of my inquiry has long since confirmed me in the opinion I have at present; and although I have considered the cases cited by the defendant's counsel with attention, I find no reason to alter that opinion, but am more confirmed in it; but I lament that accident prevented my hearing the arguments in this case.

A writ of *audita querela*, or a bill of injunction, in ordinary cases, will remedy any inequity in the judgment itself, or in issuing or completing the execution. But the writ of error cannot be construed to have a more extensive operation and effect, merely to reach the inconveniencies which *possibly* may arise from its ordinary extent and operation. The law has long since defined its limits, and the court cannot extend them. Other remedies are provided, and open to the defendant's benefit, if the circumstances of his case require it, and we cannot create a new one to give a more summary relief, even if the circumstance of his case would justify a claim upon the score of particular hardship.

VENDITIONI EXPONAS ORDERED.

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Whenever, on motion to dissolve an injunction, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing, or further order, unless the defendant admits every thing alleged in the bill on account of which the injunction was obtained. When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved, with a proviso that not more be levied than remains due after allowing every thing claimed by the complainant. But when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or further order.

A purchased land from B. and, in the bond given for the purchase money, C becomes bound as surety. B having impressed him with an idea that the money might be paid from the sale of wood on the land, to prevent the sale of which B afterwards obtained an injunction. On a bill brought by the surety, it was decreed that he should be relieved from his suretyship.

An appeal or writ of error standing under rule argument, does not abate by the death of either party, *(note.)*

LYNCH *vs.* COLEGATE.

APPEAL from a decree of the court of chancery, perpetuating an *injunction*. The bill of complaint of *Colegate*, the present appellee, filed the 10th of November 1800, stated, that one *Kingsmore*, in 1797, purchased of *Lynch*, the appellant, a tract of land for a large sum of money, to be paid by instalments; that the first instalment amounted to £1200, and was intended, in a great measure, to be paid out of the first crop on the land, and by the sale of wood; that *Lynch* declared that the wood on the land would nearly pay for the land, and it was understood and agreed, that the wood should be cut and carried to market for the purpose of paying the instalments, (in aid of the crop,) as the same should become due; that in consideration of the express agreement that *Kingsmore* should have leave to cut and sell the wood in order to meet the instalments, the complainant became bound in a bond with him to *Lynch*, conditioned for the payment of the first instalment of £1200, with interest; that the complainant would not have become security for the instalment, but under the express proviso and engagement that *Kingsmore* was to have leave to pay it off by wood; and that the inducement of his buying the land was the representation and statement made by *Lynch*, that the wood on the premises, so convenient to market, would nearly pay for the land. That *Kingsmore* paid £300 on account of the instalment; and other sums of money, and articles or accounts were paid, which *Lynch* has, or means to apply to other instalments, although they were not due at the time. That *Kingsmore* cut down 300 cords of wood to enable him to pay up the balance of his first instalment, and to exonerate the complainant, his surety; and that *Lynch* fraudulently meditated an act of oppression which he carried into effect, by bringing suits, immediately after the first instalment became due, on the bond against *Kingsmore* and the complainant, and filing a bill in chancery, and obtaining an injunction, which prevented *Kingsmore* from getting the wood to market, and to cut other wood, &c. That judgment has been obtained against the complainant by *Lynch*, who has not credited the £300, nor with such other sums of money, wood or articles, which he may have received. The bill calls upon *Lynch* to answer, &c. and to declare

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what sums of money, &c. he hath received. *Prayer* for relief, and for a *subpena*, and an *injunction* against executions issuing on the judgment, &c. *Subpena* and *injunction* accordingly issued.

The *answer* of *Lynch*, which was filed on the *25th of November* 1800, denies that he ever declared or agreed that the wood on the land should be cut and carried to market for the purpose of paying the instalments, (in aid of the crop,) as the same should become due or otherwise; nor was any agreement ever made by him with *Kingsmore*, by which the same was to be paid by wood, or that wood should be cut and sold from the land for that purpose; and therefore no inducement from such agreement could have been the motive of the complainant for becoming surety for *Kingsmore*, no such agreement having ever been made. He admits that he received £300 9 4, at sundry times, as appears by one of the accounts exhibited, which are all the payments whatsoever made by *Kingsmore* on account of the bond in which the complainant is surety. He never denied the payments, nor claimed to appropriate the same to any other instalment, but hath been, and now is, ready and willing to credit the same on the bond for £1200, in which the complainant is surety. That the credits in the other account exhibited were paid and received, and applied to the discharge of another debt due to the defendant for the articles mentioned in the debit side of that account, sold and delivered, &c. and had no relation to the land purchased. That *Kingsmore* and the complainant, having failed to comply with the condition of their bond, the defendant caused suits to be instituted for the recovery of the balance due thereon, and hath obtained judgments at law. That *Kingsmore* having proceeded, against the consent of the defendant, to the cutting and selling timber, and other trees, growing on the land, and done other acts greatly endamaging the estate, and injuring the defendant, he applied for and obtained an injunction, &c. He denies all fraud, &c.

Hanson, Chancellor, (November 25th, 1800.) The defendant having put in his answer, and entered on the docket notice of motion to dissolve the injunction in this cause issued, it is at his instance ordered, that the motion stand for hearing at next term; provided a copy of this or-

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der be served on the complainant before the end of the present month.

A service of the above order was proved to have been made, on the 27th of November, 1800.

Hanson, Chancellor, (January 6th, 1801.) The motion to dissolve, &c. being submitted, &c. The Chancellor must, on this occasion, repeat a rule, which he has always adhered to, and which he conceived was well known—"Whenever, on motion to dissolve, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing, or further order, unless the defendant admits every thing alleged in the bill, on account of which the injunction was obtained." When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved with a proviso, that not more be levied than remains due after allowing every thing claimed by the complainant; but when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or further order. Great and obvious inconveniencies would follow from a different practice. In the present case, it appears from the answer, that the complainant, at the time of obtaining his injunction, was liable to an execution, (if liable to an execution at all,) for more than was due, but in admitting this, the defendant denies the other grounds of equity; he denies that the complainant is entitled to all the deductions which he claims, so that a dispute remains between the parties. This case, like many other cases, shows, that taking an indefinite judgment does little for the plaintiff at law, but affords a fair pretext to the defendant at law for further delay, and is almost sure to produce a fresh suit between the parties. It is thereupon adjudged and ordered, that the injunction, in this cause heretofore issued, shall continue until final hearing of the cause, or further order.

The complainant entered a general replication to the answer of the defendant, and a commission issued, and testimony taken thereunder, and the cause submitted, &c.

Hanson, Chancellor, (October term 1801.) It appears to the Chancellor that the defendant, from his conduct, ought to be considered as having released the complainant

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from his engagement. It is plain from the evidence, that the defendant had at least impressed the complainant, before he became security for *Kingsmore*, with an idea, that the money would, or might be paid from the sale of timber, and other wood, on the land, and it is extremely probable, if not certain, that the complainant was thereby induced to become a surety. Whether or not, without that inducement he would have become security, is not material. It is certain that if his engagement remains binding, he has been or may be greatly injured by the defendant's obtaining an injunction; and the question is, whether he shall sustain that injury, or the defendant, who has done the wrong, be deprived of one part of his security? The Chancellor on this question cannot hesitate, and on the papers and proceedings in the cause does not perceive how he can do otherwise than decree a perpetual injunction. *Decreed*, that the injunction, heretofore issued in this cause, be perpetual, but that each party bear his own costs.

From which decree the defendant appealed to this court; and the case standing under *rule argument* at this term, the *appellant's* death was suggested, and the case was entered *abated* (a.)

Ridgely, *Johnson*, (Attorney-General,) and *W. Dorsey*, for the appellant.

Key, for the appellee.

(a) It does not appear whether or not the entry of *abatement* in this case was made by the court after argument, or by the counsel concerned. In the case of *Roche vs Johnson, et ux* in this court sitting on the Eastern Shore, it appeared that at June term 1806, the case was standing under *rule argument*, when the death of the *plaintiff in error* was suggested

J. Bayly, for the defendant in error, submitted the question to the court, whether or not, this case standing under *rule argument*, the death of the plaintiff in error abated the writ of error. He referred to the acts of 1785, *ch.* 80, and 1801, *ch* 74, *s.* 38

THE COURT decided that the case did not come within the provisions of the acts of 1785, *ch.* 80, and 1801, *ch* 74 But whether the writ of error abated, the case being under *rule argument*, the court were not then prepared to decide, and the final decision of the question they postponed for further consideration. Afterwards, at June term, 1807, the court decided, that a writ of error or appeal did not abate by the death of either party, if the case was standing under *rule argument* before the death was suggested. This decision was made by the court independent of the act of November 1806, *ch.* 90, *s.* 11.

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DECEMBER.

Morgan vs Slade

Whether or not a rejoinder of *no assets* is a departure from the plea of performance in an action upon a testamentary bond? *Quere*

Can the defendant by his rejoinder put in issue two separate and distinct facts to a replication assigning breaches for the nonperformance of the condition of a testamentary bond? *Quere*

On the plea of *no assets, ultra plene administravit*, the *onus probandi* lies on the part of the plaintiff.

Is the plea of *no assets* the same in effect as the plea of *plene administravit*? *Quere*

If an executor, &c neglects to return an inventory, is he bound for all debts and legacies &c? *Quere*

An executor cannot give in evidence that he had equally and proportionably, or nearly so, distributed the residue of the personal estate after payment of debts, &c among the several legatees.

MORGAN *vs.* SLADE, *et ux.*

APPEAL from the General Court. An action of debt was brought on the testamentary bond, executed on the 8th of February 1776, to the Lord Proprietary, on the estate of *Edward Morgan*, deceased, by the appellant, (the defendant in the court below,) as his executor. The defendant pleaded performance, to which the plaintiffs replied nonperformance, assigning breaches that the deceased, by his will, bequeathed to his daughter *Elizabeth*, the female plaintiff, £300 on her arrival at age, &c. with interest, &c. and he also bequeathed to his daughter *Susanna*, £300 on her arrival at age, &c. with interest, &c. that *Susanna* died intestate, whereby one sixth part of the said legacy, amounting to £50, became by the testator's will due and payable to the said *Elizabeth*, &c. And that the executor had not paid the said legacies, &c. The defendant rejoined *no assets*, and *payment* in the following manner, viz.

"And the said R. M. saith, that the said D. S. and E. his wife, ought not to have or maintain their action aforesaid against him, by reason of any thing above by them in replying alleged, because he saith, that no goods and chattels, which were of the said E. M. at the time of his death, have come to, or been in the hands of him the said R. M. to be administered: and that he hath not in his hands to be administered, nor had he on the day of the impetration of the original writ in this cause, any assets, goods or chattels, which were of the said E. M. at the time of his death; and this he the said R. M. is ready to verify: wherefore he prays judgment, whether the said D. S. and E. his wife, their aforesaid action against him to have or maintain ought, &c. And the said R. M. as to the breach in the replication of them the said D. S. and E. his wife, above alleged, as to the nonpayment of the said legacies, he saith, that the said D. S. and E. his wife, their aforesaid action against him to have or maintain, by any thing therein alleged, ought not, because he saith, that after the arrival to age of the said E. to wit, on the, &c. he the said R. M. paid to the said E. whilst she was sole, and before her intermarriage with the said D. the sum of £300, in form aforesaid bequeathed to her by the will of the said E. M. and the interest thereon due, as also the said sum of £50, the share or proportion of the said E. of the said £300 bequeathed to her as aforesaid, on the death of the said S. together with interest

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thereon due, to wit, at *Harford* county aforesaid; and this he the said R. M. is ready to verify. Wherefore he prays judgment whether the said D. S. and E. his wife, to have or maintain their aforesaid action against him ought, &c."

To which the plaintiffs surrejoined *assets*, and *nonpayment* as follow, viz "And the said D. S. and E. his wife, as to the first rejoinder of the said R. M. above alleged, from having and maintaining their action aforesaid against him ought not to be precluded, because they say, that goods and chattels which were of the said E. M. at the time of his death, did come to the hands of him the said R. M. to be administered, and that he hath in his hands to be administered, and had on the day of the impetration of the original writ in this cause, assets, goods and chattels, which were of the said E. M. at the time of his death; and this the said D. S. and E. his wife, pray may be inquired of by the country; and the said R. M. in like manner, &c. And the said D. S. and E. his wife, as to the second rejoinder of the said R. M. above alleged, their action aforesaid against him from having and maintaining, by any thing therein contained, ought not to be precluded, because they say, that after the arrival to age of the said E. to wit, on, &c. he the said R. M. did not pay to the said E. whilst she was sole, and before her intermarriage with the said D. S. the said sum of £300, in form aforesaid bequeathed to her by the will of the said E. M, and the interest thereon due, as also the said sum of £50, the share or proportion of the said E. of the said £300 bequeathed to the said E. on the death of the said S. together with the interest thereon due, to wit, at *Harford* county aforesaid; and this the said D. S. and E. his wife, pray may be inquired of by the country; and the said R. M. in like manner, and so forth."

1. The defendant at the trial at May term 1803, prayed the opinion of the court, and their direction to the jury, that before the defendant is bound to produce evidence on his part to prove that he had fully accounted for the estate of *Edward Morgan*, deceased, in the replication mentioned, it was incumbent on the plaintiffs to prove, that assets or personal property of the deceased had come to the hands of the defendant.

Chase, Ch. J. *(a.)* The court are of opinion, that it is incumbent on the defendant to support the issues on his

(a) Done, J. concurred. *Sprigg*, J dissented.

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part, by proving that he had not assets to pay the legacies for which this suit is brought, or that he has paid the same, before plaintiffs adduce any proof to show that assets or personal property of *Edward Morgan*, had come to the hands of the defendant. The defendant excepted.

2. The defendant then offered in evidence, that *Edward Morgan*, the testator, resided in *Harford* county, having due to him at the time of his death, which happened in the year 1775, about £1000 from different persons, which sum constituted, at the time of his death, the principal part of his personal estate, and which sum was afterwards, in the year 1779, paid to defendant, his executor, in depreciated continental currency, whereby a large part of the testator's personal estate was sunk and lost. The defendant further offered in evidence, that he, as executor, had equally and proportionably, or nearly so, distributed the residue of the personal estate among the different legatees named in the will of the testator.

Chase, Ch. J. The court are of opinion, that the evidence is inadmissible, and they refuse to permit it to go to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last term before Tilghman, Buchanan, Nicholson, and Gantt, J.

Johnson, (Attorney-General,) and *Magruder*, for the appellant, in their arguments contended, 1. That on the issue to the rejoinder of *no assets*, the *onus probandi* was on the part of the plaintiffs below. 2. That if an executor neglected to return an inventory, he was not bound for all debts and legacies. 3. That the replication was defective, in not averring that there were assets sufficient to pay the legacies. They cited and relied on the act of October 1778, *ch.* 20. *Parson vs. Henry*, 5 *T. R.* 6. *Bull. N. P.* 140. *Erving vs. Peters*, 3 *T. R.* 688. *Orr vs. Kaines*, 2 *Ves.* 194. *Quynn vs. The State*, 1 *Harr. & Johns.* 36. *Atkins vs. Hill*, 1 *Cowp.* 284. 2 *Com. Dig.* 369, 458. *Swin.* 212, 229, 401, 420, 427. *Esp. Dig.* 261.

Martin, and *T. Buchanan*, for the appellees, in their arguments, contended, 1. That the plea of performance was an admission of assets, and the plaintiffs below were not bound to aver assets in the replication. 2. That the re-

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joinder of *no assets* was a departure from the plea of performance. 3. That the defendant could not, by his rejoinder to the replication, put in issue two separate and distinct facts. 4. Whether or not the plea of *no assets* was in effect the same as a plea of *plene administravit?* 5. That on the issue to a plea of *plene administravit*, the *onus probandi* was on the part of the defendant. 6. That if an executor neglected to return an inventory, he was answerable for all debts and legacies. 7. That after verdict it would be presumed that all essential evidence was submitted to the jury. They cited and relied on *Swin.* 401. 11 *Vin. Ab.* tit. *Executor*, 380, pl. 152. 2 *Show.* 163. 14 *Vin. Ab.* tit. *Inventory*, 466. *Toth.* 183. *Godb.* 145. 146, 151. 12 *Mod.* 346. 3 *Blk. Com.* 393. *Rushton vs. Aspinall, Doug.* 683. *Roe vs. Haugh, Salk.* 29. *Hawk vs. Crofton*, 2 *Burr.* 890. *Swin.* 212, 229, 401.

THE COURT OF APPEALS concurred in the opinion given by the General Court in the second bill of exceptions, but dissented from that given in the *first* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

M'MECHEN *vs.* THE MAYOR, &c. OF BALTIMORE.

DECEMBER.

Whether or not a corporation can appear to and prosecute an action, unless by an attorney legally authorised by letter of attorney under their corporate seal? *Quere*

A warrant of attorney need not be spread on the record.

The appellate court cannot travel out of the record, but will

ERROR to the general court. This was an action of debt brought the 8th of April 1801, in the names of the defendants in error, for the use of *A. Storey*, on a writing obligatory bearing date the 23d of January 1799, executed by *Thomas Yates* and *Archibald Campbell*, with *David Stewart* and the plaintiff in error, their sureties, to *The Mayor and City Council of Baltimore*, (the defendants in error,) in the penal sum of $30,000 current money, reciting, that

make every necessary intendment in support of the judgment of the inferior court.

A judgment by confession is an admission of the right of the nominal plaintiff to recover the penalty of a bond having a collateral condition; and whether the judgment is in the right of the plaintiff, or for the use of another, is not material, and cannot be a cause for reversing it.

The court will not so construe the recital in a bond as to defeat its operation and render it a nullity.

An act of assembly directing that an auctioneer shall give bond before he obtains a license, if the fact was that the license was obtained prior to the execution of the bond, it was capable of proof, and in the power of the defendant to have availed himself of it on his plea of general performance, and insisting on that fact in his rejoinder to the plaintiff's replication assigning the breach.

A surety is not answerable beyond his engagement.

Where a defendant, having pleaded general performance to a bond with a collateral condition, and without a replication on the part of the plaintiff assigning breaches, withdrew his plea, and confessed judgment—*Held*, that such judgment admits the plaintiff's claim to the extent of the penalty of the bond on which the action was brought.

A repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before its repeal

A person who entrusted an auctioneer with the sale of goods, and has a claim against him for money arising on the sale, has a right to apply for and direct a suit on the auctioneer's bond for the recovery of his claim. *(Note.)*

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"whereas the above bound *Thomas Yates* and *Archibald Campbell* have obtained from the mayor a license of admission, under the seal of the corporation, to use and exercise the trade or business of auctioneers; and by an ordinance of the corporation, persons obtaining such license are directed, before they enter upon the functions or duties of the office, to give bond for the faithful performance of the several trusts and duties required of them by the aforesaid ordinance;" and conditioned, "that if the above bound *Thomas Yates* and *Archibald Campbell*, do and shall pay and satisfy all just claims that may be against them as auctioneers, and shall and will faithfully execute the office and employment of auctioneers, and in all things well and faithfully perform the several duties required of them by the ordinance, entitled, *An ordinance for licensing and regulating auctions within the city of Baltimore and precincts thereof*, then this obligation to be void, otherwise to be and remain in full force and virtue." Which bond was endorsed, "Approved, January 24th, 1799. *James Calhoun*, Mayor of the city of *Baltimore*." The defendant in the court below pleaded *general performance*; but afterwards relinquished his averment, and confessed judgment, which was entered for the amount of the penalty in the bond, the debt in the declaration mentioned, and costs; and which by agreement was to be released on payment of $4154 30, with interest thereon from the 1st of January 1800, and costs. The defendant afterwards brought the present writ of error.

The cause was argued before Chase, Ch. J. Buchanan and Gantt, J.

M'Mechen, for the plaintiff in error, contended, that it did not appear by the record that there was any authority from the *Mayor and City Council of Baltimore* to authorise any person to prosecute this action. A corporate body cannot appear in person, or by attorney, to prosecute or defend a suit, unless by letter of attorney under their corporate seal. 1 *Blk. Com.* 502. 503. To enable an attorney to appear for a corporation, he must be authorised, by warrant of attorney, under their common seal. It does not appear by the record that there was any warrant of attorney authorising any attorney, or other person, to institute or prosecute this action; if such authority was given

it should have been certified in the record. Special errors, assigning that there was no such warrant of attorney, were offered at the last term, but general errors having before been assigned, they were refused to be received by the counsel for the defendants in error. They had notice therefore, that under the general errors, the want of a warrant of attorney would be relied on by the plaintiff in error. The special error, that there is no warrant of attorney certified in the record, is relied on, and now offered to be assigned; and it is prayed, on the part of the plaintiff in error, that a *certiorari* may issue, directed to the keeper of the records of the late general court, requiring him to certify whether or not there is any warrant of attorney in this action. That a writ of *certiorari* should be granted in this case, fully appears in *Lill. Ent.* 227, 253, 352, 556, 558, 560.

Key and *Harper*, for the defendants in error. The writ of *certiorari* ought not to be granted for the purpose alleged. The practice of our courts is to consider the appearance of an attorney for either party to be regular, and that he had sufficient authority to do so. In the case of a common person it has always been so considered, and there is no reason why it should be otherwise in the case of a corporate body. The warrant of attorney is no more necessary in the one case than it is in the other. If the writ of *certiorari* were to issue, and it was certified that there was no warrant of attorney, this court would presume the attorney had authority; and if he had no such authority, the corporation had their remedy against the attorney for an improper use of their name against their consent. In the case of *The Corporation of the Roman Catholic Clergymen's Lessee vs. Hammond*, 1 *Harr. & Johns.* 580, there was no warrant of attorney, and no objection for the want of it was made. It is every day's practice to use the name of the state in actions on public bonds, without any special directions for that purpose.

Ridgely and *M'Mechen*, in reply. The case of *The Corporation of the Roman Catholic Clergymen's Lessee vs. Hammond*, was an action of ejectment, wherein a demise was stated to have been made to a lessee, and the action was brought in the name of the lessee. That case, therefore, has no bearing on the question before this court. It is by common consent that an attorney appears for an individual

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without a warrant of attorney, but were an objection made, the court would not permit it. The books, however, are explicit, that a corporation, being an invisible body, cannot appear in person, but must appear by attorney, authorised by warrant of attorney under their corporate seal: and it is fatal unless there be such authority. With respect to the name of the state being used, there is an express act of assembly authorising it in suits on testamentary, administration, sheriffs, and other public bonds.

Chase, Ch. J. The court consider that it is not necessary to spread the warrant of attorney on the record. Every thing will be intended in support of the judgment, unless the contrary appears.

M'Mechen, for the plaintiff in error, then contended—

1. That the bond was not taken in conformity to the ordinance of the Mayor and City Council of *Baltimore* of the 12th of December 1798, but was entered into after, instead of before the license was granted. He referred to that ordinance; also to *The Inhabitants, &c. of Chittinston vs. Penhurst*, 1 *Salk.* 475, and *Rex vs. Croke, Comp.* 26.

2. That the ordinance, under which the bond was taken, was repealed previous to the bringing this action; and as the repealing ordinance saved no rights, the action could not be supported. He referred to the act of 1796, *ch.* 68, *s.* 8. *Miller's* case, 1 *W. Blk. Rep.* 451. 6 *Bac. Ab.* tit. *Statute*, (D.) 372. and *Rex vs. The Justices of London*, 3 *Burr.* 1456.

3. That this action is stated to be brought in the names of *The Mayor and City Council of Baltimore*, at the instance and for the use of *Alexander Storey*. He referred to *Martyn vs. Hind.* 1 *Doug.* 142. The acts of assembly October 1780, *ch.* 30. May 1781, *ch.* 11; 1784, *ch.* 61; 1790, *ch.* 12; and 1796, *ch.* 68.

4. That in a suit on a bond against a surety, it must be shown that he is bound. That a surety is not bound beyond the scope and extent of his engagement, which are confined to the strict letter of the bond. He referred to *Wright vs. Russell*, 3 *Wils.* 530. *Sloss vs. Galloway*, 3 *Harr. & M'Hen.* 204. *The State vs. Wailes, Ibid* 241. *Straton vs. Rastall*, 2 *T. R.* 366. *Quynn vs. The State*, 1 *Harr. & Johns.* 36.

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3. That there was no replication assigning the breaches; and that the confession of judgment did not cure the defect. He referred to *Quynn vs. The State*, 1 *Harr. & Johns.* 36. *Hardy vs. Moore's Ex'rs*, 3 *Harr. & M'Hen.* 389. *Bowie vs. The State*, *Ibid.* 408. *Dorsey vs. Stevenson's adm'r.* 4 *Harr. & M'Hen.* 351. *Green's adm'r. vs. Couden's adm'r. Ibid.* 352.

Key and *Harper*, argued for the defendants in error.

Chase, Ch. J. delivered the opinion of the court. The court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior court *(a.)*

The judgment by confession is an admission of the right of *The Mayor and City Council of Baltimore* to recover the penalty of the bond; and whether it is in their own right, or for the use of another, is not material, and cannot be a cause of reversing the judgment.

According to the record, and the nature of the transaction as disclosed by it, the legal and necessary intendment is, that the bond and license were given on the same day, and that the execution of the bond preceded the granting of the license, because the nature of the transaction required it.

The court cannot so construe the recital in the bond as to defeat its operation, and render it a nullity; such an exposition would be a violation of the plainest principles of law and justice.

If the fact was, that the license was obtained prior to the execution of the bond, it was capable of proof, and in the power of the plaintiff in error to have availed himself of it, by retaining his plea of general performance, and insisting on that fact in his rejoinder to the replication of the defendants in error assigning the breach.

That the security is not answerable beyond his engagement, is a position that cannot be controverted.

In this case the plaintiff in error, as security, reposed a confidence in the principals, the auctioneers, and not in the mayor; and actually engaged that the auctioneers should pay and satisfy all just claims against them as auctioneers;

(a) If by any means whatever the plaintiff can be supposed to have a title as laid in the declaration, as this is after verdict, we will hold this judgment right, and there is no inconsistency. *1 Wils.* 1. 3 *Burr.* 1725, 7.

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and the judgment, by confession, admits the claim of *The Mayor and City Council of Baltimore*, against the plaintiff in error, to the extent of the penalty of the bond, subject to the release on the record.

The repealing ordinance cannot destroy or affect any right which was acquired by any person under the first ordinance before the repeal thereof.

JUDGMENT AFFIRMED *(a.)*

(a) The court were also of opinion, (though as this point was not before them, they omitted it in the written opin on which was delivered,) that every person who entrusted the auctioneers with the sale of goods, and had a claim against them for money arising on the sale of the goods, has a right to apply to the mayor and city council to direct a suit to be instituted on the bond of the auctioneers for the recovery of his claim, and the corporation could not, consistent with their duty under the ordinance, refuse such application, and might be enjoined, by suit in chancery, to allow the person to use their name to prosecute his claim.

DECEMBER.

The specific performance of a bond for conveying a tract of land executed in 1764, decreed on a bill filed in 1792.

A decree in favour of the *complainant*, but *without costs*, was, on appeal by the *defendant*, reversed as to the costs, and affirmed as to the residue; and it was decreed that the compl't. should recover his costs in both courts.

HAFFNER'S Devisees vs. DICKSON'S Heir.

APPEAL from a decree of the court of chancery. The bill was filed by the present appellee, (the complainant in the court of chancery,) on the 9th of July 1792, against *Frederick Haffner*, who died without answering the bill, and a bill of revivor was afterwards in May 1796, filed against his sons and devisees, the present appellants. The facts stated in the original bill, bill of revivor, and in an amended bill, are, that *Frederick Haffner*, on the 11th of May 1764, entered into a bond to *James Dickson*, the brother of the complainant, conditioned, that if *Haffner*, his heirs, &c. "do and shall well and truly convey and make over unto the above named *James Dickson*, his heirs, &c. by a good and sufficient deed, of one full half of the *Resurvey on the Discovery*, and now patented and called *Haffner's Choice*, on or before the first day of July next ensuing the date hereof, then," &c. At the foot of the bond, and before the signature of the obligor, it was thus written: "It is to be remembered, that, before signing and sealing, it is agreed, that out of the above tract 100 acres shall be laid off for *Daniel Maddes*, and then one half of the remainder is to be conveyed to *James Dickson*." That the land is called and designated in the bond of conveyance by a wrong name. That *Haffner* originally, on the 10th of November 1752, obtained a grant for 45 acres of land, call-

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ed *Havanaer's Discovery*. That a warrant afterwards issued on the 1st of February 1760, and renewed on the 22d of September 1761, to resurvey the land under the name of *Haverner's Discovery*. That a certificate was returned, dated the 10th of December 1761, and patent issued to *Haffner* for the land by the name of *The Resurvey on Havenear's Fancy*, on the 29th of September 1762. That by the table of courses annexed to the certificate of *The Resurvey on Havenear's Fancy*, it appears that *Haverner's Discovery* was the land resurveyed; and by the rent rolls it appears that *The Resurvey on Havanor's Fancy* was originally called *Havanor's Discovery*, and contained 45 acres. That the land patented under the name of *The Resurvey on Havenear's Fancy*, and the land which *Haffner* obliged himself to convey by the bond of conveyance, is one and the same tract of land, and not different. That *Haffner*, being seized and possessed of the land, came to an agreement with *Dickson* relative to the sale of a moiety of the same, deducting 100 acres, and that *Dickson* paid the full amount of the purchase money agreed on, and in consideration thereof, *Haffner* executed the bond to convey the moiety to *Dickson* in fee simple. That *Dickson* died, after the payment of the purchase money, and the date of the bond, in possession of a moiety of the land, and left the complainant his heir at law, who is in equity and justice entitled to a conveyance thereof, pursuant to the bond. That *Haffner* is since dead, having by his will devised the land, of which the complainant claims part, to his sons, the defendants, in fee simple, as tenants in common, &c. *Prayer*—that it be decreed that the defendants convey a moiety of the land. according to the bond to the complainant, in fee simple, together with such further and other relief in the premises as complainant's case may deserve, &c. The *answers* of the defendants state, that their father did own a tract of land called *Havenear's Discovery*, but no warrant of resurvey was obtained by him to resurvey that tract; but it was to resurvey *Havenar's Fancy*, and under that warrant a survey was made, a certificate returned, and a patent granted to their father, for a tract of land called *The Resurvey on Havenear's Fancy*, containing 695 acres, of which their father was seized and possessed until his death; and since his death the defendants have been in the seizin and possession, and are now seized and possessed

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thereof. That they were not privy to the contract entered into between their father and *Dickson*, and only know what land he sold to *Dickson*, if any, from the papers exhibited by the complainant; and they do not know, nor can they admit, that it was any part of *The Resurvey on Havencar's Fancy*, for the conveyance of which the bond was given. That they understood from their father, that having executed a survey many years ago, he included more land therein than he thought himself able to pay for in the land office, and therefore agreed with *Dickson* to let him have half the land so taken up, provided he would pay half the caution money, and other expenses attending the securing and making perfect the title to the same. That they often heard their father say, that it was in consequence of this agreement, and upon no other consideration whatsoever, that he passed his bond to *Dickson* for the conveyance of certain lands in the bond mentioned, but which bond they have never seen. That they have been informed, &c. that when the certificate of survey for the land thus contracted for was returned to the land office, *Dickson* was either unable or unwilling to pay his proportion or dividend of the expenses necessary to secure the land; and that their father was compelled so to do, and did actually make sacrifices to borrow and procure the money to secure the land, and did actually pay for the whole himself; and that their father never did receive from *Dickson* any valuable, or other consideration, for the bond which he executed in manner aforesaid. That they have also understood from their father, that no writing of any kind ever passed to him from *Dickson*, respecting the land; that their father, being an illiterate man, and reposing great confidence in *Dickson*, took no writing from him on the business. They do not believe that *Dickson* ever had possession of any lands whatsoever in consequence of the bond: on the contrary they have been informed, &c. that *Dickson*, well knowing he was not entitled to have a conveyance, &c. never did, during his whole life time, ask their father to convey, &c. They insist upon the act of parliament, or statute of limitations, made in the 21st year of the reign of King *James* the I. and pray the benefit of that act. That after the great length of time which hath elapsed since the execution of the bond, and before any bill filed to obtain a specific performance thereof, they are informed the complainant is not

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entitled to relief, and they rely on the said length of time to bar the complainant of the relief prayed, and pray to have the benefit thereof at the hearing, as fully as if they had pleaded the same, and relied thereon by way of plea, &c.

Commissions were issued, and *testimony* taken thereunder, proving the hands writing of the witnesses to the bond, who were dead. That a warrant of resurvey was taken out on the 27th of November 1784, in the joint names of *Haffner* and *Dickson*, at their request, to resurvey a tract of land called *Haffner's Fancy*, but which was not executed. That the complainant was brother and heir at law of *Dickson*. That in the year 1784, on executing a commission to perpetuate the bounds of the land called *The Resurvey on Havaner's Fancy*, issued by and in the name of *Frederick Havaner*, the complainant claimed a conveyance for his share of the land of *Haffner*, according to the bond which he exhibited to *Haffner*, executed by him to *Dickson*; that *Haffner* acknowledged it, and said *Dickson* had paid all the money that could in justice be demanded of him for his part of the land. That *Haffner*, in stating objections to his conveying the land, said he had paid taxes on it. That as there was some dispute about some part of the land, and as it was intended by both to sell, it was finally agreed to wait the result of that dispute. That at another time the complainant called on *Haffner* for a conveyance of one half of the land *Haffner* then lived on, who alleged he had paid taxes, &c. as much as he thought the land was worth. That complainant proposed to make him payment for all the money he had advanced on the land, on his making a conveyance, which *Haffner* refused to do. That *Haffner* admitted that the land he lived on was the land the complainant was entitled to, if he was entitled to any, and is the same land mentioned in the bond of conveyance, and that it is a tract of land called *The Resurvey of Havenear's Fancy*. That *Haffner* afterwards promised to settle the business in a peaceable manner as soon as he settled some dispute about the land with one *Shehawn*.

Hanson, Chancellor, (July 19th, 1803.) This cause coming on to be heard, was most ably debated by the counsel on each side. The Chancellor has never heard a cause which appeared to him more difficult to decide, so as to secure an affirmance by the court of appeals. However the

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Chancellor may differ in sentiment from that tribunal, he has always considered it his duty to determine according to their known opinion. But in various causes, which have been carried to that tribunal, and in which the question was, whether or not an agreement respecting land should be enforced, they have decided, without laying down their principles for the future government of the chancellor. In the present instance, if he could divine how the court of appeals would decide, he would certainly decide accordingly, as indeed he would in every other case. Sometimes it has appeared to him that the court of appeals has considered it proper to enforce almost any agreement whatever. At other times it has appeared to him that they have adopted a strictness beyond any thing to be met with in the books.

That the agreement which *Dickson* prays this court to enforce, is uncertain, and that it has lain so long dormant, as to have no title, agreeably to established principles, to be enforced, has been contended on the part of the defendants. It is also on their part contended, that there is no sufficient proof of its having been performed on the part of *James Dickson*, under whom the complainant claims. If the defendants are right, the complainant is not entitled to relief. But the complainant denies every allegation, and the parties are at issue upon them.

It has always been a practice of the Chancellor, and he probably will always consider it right, where a cause is doubtful to himself, where his decision, whatever it may be, is in his own opinion just as likely to be reversed as to be affirmed, and where he can propose such a compromise as appears to him likely to coincide with the judgment of honest sensible arbitrators, chosen by the parties, it has always, in such cases, been his practice to propose that a decree pass by consent, which shall at once end all controversy.

In the present case he proposes that the parties agree, by writing here filed, that a decree pass to the following effect: 1. That each party bear his own costs. 2. That the defendants convey to the complainant two thirds of the land in question; that is to say, two thirds of what the complainant claims: or that the said land be sold by a trustee, appointed by the Chancellor, who shall act under the Chancellor's control, and report his sale, which shall not

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be valid until ratified by the Chancellor, and who shall receive a commission as in similar cases; and that the nett proceeds shall be divided between the complainant and the defendants, two thirds to the complainant, and the other third to the defendants. 3. The complainant shall release to the defendants all claim to profits on the land by him claimed.

The Chancellor requests that a copy of this recommendation be served by the complainant on the defendants, unless he, (the complainant,) disapproves of it. If he shall declare in writing to the Chancellor his disapprobation, or if the defendants, on being served, shall not, within one calendar month after service, express their approbation, the Chancellor will proceed to decree to the best of his judgment. The complainant is requested to decide as early as conveniently may be.

Hanson, Chancellor, (August 1st, 1803.) The complainant having by his petition to the Chancellor, and filed in the cause, agreed to waive all right to a decree to account for the rents and profits of the land in controversy, reserving to himself all right and equity to an account of those rents and profits in any future bill for an account for the same, *Decreed*, that the defendants shall forthwith, by a deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, convey unto the complainant, and his heirs, as tenant in common, one undivided moiety or half part of, in and to, all that tract of land in *Frederick* county called *The Resurvey on Havenear's Fancy*, which was originally granted unto *Frederick Havenear*, now deceased, by patent bearing date on the 29th day of September 1762; provided always, and liberty is hereby reserved unto the complainant, to file a new bill or bills against the defendants for an account of the rents and profits of the said land; and also reserving to the complainant all equity which he now hath or may have to an account of the said rents and profits; the Chancellor so decreeing, because the complainant hath filed a writing to that purpose, and the Chancellor, therefore, being excused from giving any opinion on the subject of profits. Also *decreed*, that the defendants and the complainant shall each bear his own costs in this suit expended.

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In decreeing thus, the Chancellor flatters himself, that he pursues the opinion of the court of appeals, or rather the principles which must be supposed to have governed them in the late case of *Browne vs. Browne*, (1 *Harr. & Johns.* 430;) and he takes the liberty of referring to his own recommendation in this court filed, which, as he was informed by the complainant's counsel, would be rejected by the complainant. He repeats, that in decreeing, as he does, he conceives that he pursues the principles which governed the court of appeals in the recent cause of *Browne vs. Browne*, in which his decree was reversed. He may be mistaken with respect to those principles, which indeed the court of appeals has not explained; but he flatters himself that the important tribunal of the court of appeals, on reflection, will perceive the propriety of always explaining the grounds on which they reverse a decree, in order that the Chancellor may in all future causes obey them, as his duty requires him to do. It is notorious, that in many causes a variety of points of law and equity are disputed between the parties; a simple affirmance or reversal does not, cannot inform the Chancellor on which of the points they have decided the cause.

From which decree the defendants appealed to this court, and the cause was argued before Chase, Ch. J. Buchanan, and Gantt, J.

Johnson, (Attorney General.) for the appellant, contended, 1. That it was not a matter of course to decree a specific performance of a contract. He cited 2 *Pow. on Cont.* 221, 233, 242. 2 *Vern.* 415. 2 *Com. Dig.* tit. *Chancery*, (2 C. 16.) *Buxton vs. Lister*, 3 *Atk.* 383. 2. That the length of time, before the application for relief, ought to prevent its being granted. He referred to 2 *Pow. on Cont.* 260.

Key, for the appellee, in his argument cited *Peake's Evid.* 56, 57.

The Court of Appeals, *Decreed*, "that the decree of the Chancellor, so far as the same relates to the costs in the court of chancery, be and the same is hereby reversed; and that the appellee recover against the appellants the costs by him expended in the court of chancery." Also

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decreed, "that the residue of the said decree be and the same is hereby affirmed, except so far as the said decree operates to compel the appellants to convey any interest in the one hundred acres of land to be laid off for *Daniel Maddes*, mentioned at the bottom of the condition of the bond executed by *Frederick Haffner* to *James Dickson*, dated the 11th of May, 1764, and exhibited in the bill filed in the cause; and as to the said one hundred acres of land, the said decree is reversed."

"And for the purpose of carrying this decree into effect," it was further *decreed* "that the Chancellor pass a decree, thereby directing the appellants forthwith, by a deed or deeds of bargain and sale, to be duly executed, acknowledged and recorded, to convey unto the appellee, and his heirs, as tenant in common, one undivided moiety or half part of, in and to, all that tract of land, lying in *Frederick* county, called *The Resurvey on Havenear's Fancy*, which was originally granted unto *Frederick Havenear*, now deceased, by patent, bearing date on the 29th day of September 1762, except one hundred acres of the said land, stated on the bond of conveyance executed by the said *Frederick Haffner* to *James Dickson*, dated the 11th of May 1764, and exhibited in the bill in this cause, to be laid off for *Daniel Maddes;* and the deed or deeds, to be executed in pursuance of the said decree, to contain an exception as to the said one hundred acres. And by the said decree the Chancellor shall direct the said appellants, to pay to the said appellee, the costs in the court of chancery." And it was further *decreed*, "that the appellee recover against the appellants the costs by him expended in this court."

KEEFER *vs.* YOUNG.

DECEMBER.

Parol evidence admitted to prove that the land granted to the husband of a demandant, is the same land of which dower is demanded

In an action of dower it is not necessary to lay any damages in the declaration, *(note)*

A demurrer to the declaration being overruled, judgment was entered for dower and costs, *(note)*

APPEAL from *Frederick* county court. An action of *dower* was brought by the present appellant, who was the wife of *Bartle Keefer*, deceased, "for the third part of 50 acres of land, with the appurtenances, lying and being in *Frederick* county, consisting of part of a tract of land called *Ohio*, and part of a tract of land called *Wertimburgh*, which she claims as her dower of the endowment of the said *Bartle Keefer*, her late husband," &c. The defendant pleaded, 1st. That *Bartle Keefer* was not seized, &c. And 2d.

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That he was alive at the time of the impetration of the writ. Issue was joined to the first plea; and replication that *Bartle Keefer* was not alive at the time, &c. as to the other plea, and issue joined.

1. The demandant, at the trial, to prove that *Bartle Keefer* was seized of the tract of land called *Wertimburgh*, offered in evidence a patent of a tract of land called *Wertinburgh*, granted to *Bartel Keefer* on the 17th of July 1765; and proved that the patentee of *Wertinburgh*, entered upon the land, and was seized thereof, as the law requires. She then offered a patent for a tract of land called *Whiterback*, granted to *George Haiman* on the 13th of November 1759, for 27 acres; and that the patentee entered upon the land, and was seized thereof as the law requires. Also a deed from *George Herman*, the patentee of *Whiterback*, to *Bartel Ceefer*, dated the 20th of August 1765. And that the grantee entered upon the land in the deed mentioned, and was seized thereof as the law requires. And she offered to prove that the grantee, in the deed last mentioned, and the patentee in the patent of *Wertinburgh*, was the same, and not divers or different persons; and that the land called *Wertinburgh* in the patent, and the land called *Wertimburgh* in the declaration mentioned, is the same land, and not divers; and that *George Haiman*, the patentee of the tract of land called *Wertimburgh*, and the grantee in the deed before referred to, is the same person, and not divers. She also proved that *Bartle Keefer* was seized in his demesne as of fee of the said tract of land called *Wertinburgh*, and that he died seized thereof in the year 1777, and before the impetration of the original writ in this cause. She also proved that she was the wife of *Bartle Keefer*, lawfully accoupled in holy matrimony. She then offered parol evidence to prove, that the tenant in this action holds the land called *Wertimburgh*, and the part of *Ohio*, conveyed as aforesaid to *Bartle Keefer*, claiming the same under the heirs of *Bartle Keefer*. The defendant then prayed the opinion of the court, and their direction to the jury, that the evidence on the part of the demandant did not support the declaration, and that the demandant could not recover under the same. Of which opinion the county court, [*Clagett*, Ch. J. and *Shriver*, A. J.] were, and so directed the jury. The demandant excepted.

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2. The demandant then prayed the opinion of the court, that on the issues joined in this cause, she hath shown good title to recover her dower of the tract of land called *Wertimburgh*, in the declaration named; which opinion the county court refused to give. The demandant excepted; and the verdicts and judgment being for the defendant, she appealed to this court.

Shaaff and *Brooke*, for the appellant, cited 2 *Inst.* 286. 10 *Coke*, 117, *Pilford's* case.

Taney and *F. S. Key*, for the appellee.

The Court of Appeals *reversed* the judgment of the County Court, disagreeing with that court in the opinions expressed in both of the bills of exception.

PROCEDENDO AWARDED(a).

(a) Neither in this case, nor in that of *Keefer vs. Marker*, were any damages laid in the declaration. The case of *Keefer vs. Marker* was also an *appeal* from Frederick county court, in an action of *dower*. To the declaration there was a *general demurrer*, and joinder in demurrer, and the county court ruled the demurrer good, and gave judgment for the defendant; from which judgment the demandant appealed to this court. And at this term the court of appeals *reversed* the judgment, and entered a judgment for the demandant for dower and costs.

Dannison *vs.* Robinett, *et al.*

December.

Where a person, having the equitable interest in land, is in possession, yet if such interest is not known, it will not prevail, if established, over the legal estate commencing subsequent to the equitable interest

Appeal from a decree of the Court of Chancery, *dismissing* the bill of complaint of the present appellant. The bill states, that *William Smith*, one of the defendants, being seized in fee of a tract of land called *Sugar Tree Camp*, lying in *Washington* county, containing 100 acres, mortgaged the same to *James Bryant* in 1788, in consideration of his having paid debts for him to the amount of £39. That *Smith* had three sons, named *Christian*, *Philip* and *Peter*, (also defendants,) and he was indebted to *Christian* in the sum of £109 13 10, as ascertained by a settlement made between them on the 22d of May 1789. That he had no means to discharge the debt, except by a sale of his equity of redemption in the land. That it was agreed between the father and his sons that the former should sell to them the land, and a bond of conveyance was executed for the purpose dated the 22d of May 1789. And it was also agreed, that on the sons *Philip* and *Peter*, paying to

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Christian two thirds of the debt due to him, they were equally to have the land. From the time of the contract, to the year 1798, the three sons possessed the land. While they were in possession, *Moses Robinett*, (another defendant,) who had a knowledge of their equitable right, purchased the same land from *William Smith*, and obtained a deed, dated the 8th of October 1793. That *Peter*, one of the sons, was induced by *Robinett* to believe his title was invalid, and he contracted with him for the same for the sum of £15, for which a note was given, but the money has never been paid. That *Joshua Wilson* (another defendant,) paid to *James Bryant* the money due on the mortgage, and obtained an assignment of the same. That *Robinett*, having obtained the deed, applied to two magistrates for a writ of *forcible entry and detainer*, availing himself of a period when the sons could obtain no counsel, and they were induced to believe they would be turned out of possession, and therefore gave up the possession. That the magistrates who attended were those before whom the deed was executed, and one of them the agent of *Robinett*. That on the 29th of November 1793, *Joshua* and *Isaac Wilson*, (also defendants,) in consideration of $20 paid to *Christian Smith*, obtained an assignment of his interest in the bond of conveyance, and on the 19th of June 1794, for the like sum paid by *Dunnison*, (the complainant,) reassigned the bond to him. That *Peter Smith*, on the 1st of March 1794, and *Philip Smith*, on the 18th of April 1794, assigned their interests in the bond to the complainant for the like consideration. That *Robinett*, after he obtained the deed, paid to *Joshua Wilson* the money he had paid on the mortgage, and received an assignment. That the complainant tendered to *Robinett* the principal and interest due on the mortgage, and tendered and claimed a conveyance, but that *Robinett* refused to receive the money, or execute the deed. The object of the bill was to obtain that conveyance, and for *Robinett* to account for the profits of the land from the time he took possession of it.

The *answers* of all the defendants, except *Robinett*, admit the facts stated in the bill. He *does not* admit the *debt* to the sons, nor the *bond of conveyance*, or *his knowledge of the same*, if it did exist, before the deed to himself.

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Dammison vs Robinett

The complainant offered in evidence sundry depositions of witnesses, taken under a commission issued from the Court of Chancery, to prove—1. The execution of the *bond of conveyance.* 2. The consideration, possession, and notice to *Robinett.* 3. The assignments executed by the three sons of *William Smith* to the complainant.

Hanson, Chancellor, (October term, 1803.) The answer of the principal defendant, who is called on to convey, &c. expressly denies knowledge of an equitable title in the persons under whom the complainant claims, and there is not testimony, which, according to the principles of this court, is sufficient to refute the answer, taking the whole of the testimony into consideration. *Decreed,* that the bill be *dismissed,* but without costs. From which decree the complainant appealed to this court.

The cause was argued in this court before Chase, Ch. J. Tilghman, Buchanan, Nicholson, and Gantt, J.

Johnson, (Attorney-General,) for the appellant, contended—1. That a prior equitable right to land will prevail over a legal title acquired with a knowledge of that equitable right.

2. That where the person having the equitable interest is in possession of the land, there, although *in fact* his equitable interest *is not known,* still it will prevail, when established, over the legal estate commencing subsequent to the equitable interest. In other words, the possession alone will exclude the legal right from being protected, on the ground of being ignorant of the equitable right. He cited 2 *Fonbl.* 155, *(note* m): *Smith vs. Low,* 1 *Atk.* 490; and 1 *Pow. on Cont.* 302.

3. That the appellant may recover two thirds; that is, the proportions of *Christian* and *Philip,* supposing the conduct of *Peter* may exclude him, or his assignee, from the recovery of the other third.

4. That if *Peter,* at the time of the conveyance from *William Smith,* was ignorant of his right, and that *Robinett,* or his agent, contributed to induce him to the belief that he had no right, his one third may be recovered.

5. That the assignee of *Christian* alone is entitled to a conveyance of the whole land, until *Peter,* or his assignee, pays his portion of the debt.

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6. That the appellant is entitled to an account of the profits to sink the mortgage debt. He referred to *Jarrett vs. West*, in this court.

Shaaff, for the appellees. A decree for a specific execution of a contract is not *ex debito justitiæ*, but at the discretion of the court. An agreement, to merit the interposition of a court of equity in its favour, must be fair, reasonable, *bona fide*, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, free from fraud, &c. 2 *Pow. on Cont.* 221. Unless a contract has all these ingredients, a court of equity will not decree a specific performance. The Chancellor decreed in this case, upon the ground that notice was not sufficiently proved. And in support of the decree dismissing the bill, it is contended—1. That there was no contract proved. 2. If there was a contract, it was a voluntary and fraudulent one. 3. The bill has not charged any thing like notice to *Robinett*. He referred to 1 *Pow. on Cont.* 302. *Butcher vs. Stapely*, 1 *Vern.* 365. *Borret vs. Gomeserra*, *Bunb. Rep.* 94. 2 *Eq. Ca. Ab.* 17, 48.

The Court of Appeals *affirmed* the decree of the Court of Chancery.

December.

Worthington, *et al. vs.* Bicknell.

A executed a mortgage to B. of real and personal property, to secure the payment of a sum in the *then* current money, and it was afterwards agreed between them, that the personal property should be released, on A's endorsing on the mortgage that it was a *specie* debt. A afterwards conveyed his equity of redemption in the real estate to C., who, on the representations of B. of the sum due on the mortgage, and that it should not be released unless C executed to him his bond for that sum, did accordingly execute such bond; on which a suit at law was brought, and judgment rendered thereon. On a bill in chancery by C. an injunction was obtained to stay proceedings at law. The auditor was ordered to state the mortgage debt in continental money, reducing it into specie at 5 for 1, with interest, and credit the payments made; and on such statement it appeared that the debt was over paid. *Decreed*, that the injunction be perpetual.

Parol evidence admitted to prove, that a debt secured by a mortgage was continental money, altho' expressed to be a specie debt.

Where there is a mortgage, with a personal covenant by the mortgagor that he will pay the money, and he assigns his equity of redemption, is he a competent witness for the assignee to prove that the money loaned was continental money? *Quere.*

The assignee of a mortgage is entitled to the same relief that the mortgagor would have been entitled to against the mortgagee.

A decree in favour of the *complainant*, but *without costs*, was on appeal by the *defendant*, reversed as to costs, and affirmed as to the residue; and decreed that the complainant should recover his costs in both courts.

Appeal from a decree of the Court of Chancery. The bill, filed by the present appellees in 1801, stated that

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Richard Robinson, being seized in fee of several tracts of land, on the 1st of May 1778, borrowed £170 of the then current money, of *B. T. B. Worthington*, whose executors and representatives the appellants are, and executed a mortgage of his said lands, and sundry slaves, &c. for the payment of the said sum of money, with interest thereon, on the 1st of September then next ensuing. That *Robinson* being about to leave the state, on the 6th of October 1782, applied to *Worthington* to release the personal property mortgaged, as the land was amply sufficient for the payment of the mortgage debt, which he refused to do unless *Robinson* would endorse on the mortgage the sum of money then due in gold and silver, which he agreed to, and the sum then stated to be due was £145 3 3 gold and silver, current money. That on the 15th of October 1782, *Robinson* assigned all his right, and equity of redemption in the mortgaged premises, to *Ninian Riggs*. That *Robinson*, after the mortgage, became indebted to the complainant, *Bicknell*, for money actually paid and advanced. That *Robinson*, in consideration thereof, and in consequence of a contract between the complainant and *Riggs*, agreed that the right of redemption in the mortgaged premises should be conveyed to the complainant, and a deed was accordingly executed. That the complainant having obtained the conveyance, and being interested in the payment of the mortgage debt, was applied to by *Worthington* on the subject, who represented to the complainant that there was then due from *Robinson* to him, for principal and interest, the sum of £171 6 0, on the 26th of February 1791, and that the complainant could not and should not obtain the benefit of the equity of redemption by a release of the mortgage, unless he gave him his bond for that sum of money; and that the complainant, confiding in the representations of *Worthington*, gave his bond accordingly. That *Worthington* is since dead, and *J. Worthington*, one of the defendants, is his executor, who has brought an action at law on the bond, and obtained a judgment. That the executor, and the other defendants, on the 25th of July 1795, filed a bill against *Robinson*, *Riggs*, and the complainant, for a sale or foreclosure of the equity of redemption of the mortgaged premises. That by the answers to that bill, and the evidence taken, it appears that the sum loaned by *Worthington* to *Robinson*, and the mortgage taken, was to

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secure the payment of continental money, and that the sum due, calculating its worth by the scale of depreciation, with legal interest, had been paid off or reduced to the sum of £9 5 2 current money, on the 13th of December 1798. That the executor of *Worthington* is indebted to the complainant in the sum of £13 17 6, current money, for articles charged in the account exhibited. *Prayer* for a perpetual *injunction* against execution issuing on the judgment at law, and to compel a release of the mortgaged premises, &c.

On the coming in of the *answers*, and on the testimony taken in the cause, amongst which was that of *Robinson*, the *Auditor* was directed to state an account between the parties. He made various statements, to which both parties excepted, and by the Chancellor's order he made one, wherein the money loaned to *Robinson* on the mortgage, viz. £170 continental money, was charged against *Bicknell* at 5 for 1, with the interest thereon, and after crediting payments made at various times, and the costs on the bill filed by the executors, &c. of *Worthington*, which they had dismissed, left a balance due to the complainant, on the 1st of March 1804, of £10 1 11, current money.

Hanson, Chancellor, (7th March, 1804,) *decreed*, that the injunction issued be perpetual; and that each party pay his own costs, &c. From this decree the defendants appealed to this court.

The cause was argued before Chase, Ch. J. Buchanan and Nicholson, J.

Ridgely, for the appellants, contended, 1. That all the necessary and proper parties are not before the court. He referred to *Hind's Prac.* 2. 2 *Eq. Ab.* 170. *Pre. in Chan.* 83.

2. That *Bicknell* is not entitled to relief on account of the transaction between *Robinson* and *Worthington*, because he is no party to the contract, and has no privity of interest, he not representing *Robinson*.

3. That if *Bicknell* has a privity of interest, and is entitled to *Robinson's* equity, yet there is no legal testimony in the cause to prove the facts alleged in the bill, because *Robinson*, the only person produced as a witness, is incompe-

1807.

Pollitt vs Parsons

tent on two grounds, 1st. He is interested, because there is a personal covenant in his mortgage to *Worthington*, that he will pay the money; and 2d. Because he is swearing to impeach the security he gave, and to invalidate his own act and deed. He cited *Gilb. L. E.* 122. *Hesketh vs. Braddock*, 3 *Burr.* 1856. *Walton vs. Shelly*, 1 *T. R.* 296. *Buckland vs. Tankard*, 5 *T. R.* 578. *Goodlittle vs. Bailey*, *Cowp.* 600. 1 *Fonbl.* 188. 1 *Harr. Chan.* 305, 613.

Johnson, (Attorney General,) for the appellee, referred to *Piddock vs. Brown, et. al.* 3 *P. Wms.* 289. 2 *Com. Dig.* 96.

The Court of Appeals *decreed*, that so much of the decree of the chancellor, as granted a perpetual injunction on the judgment in the bill and proceedings mentioned, be *affirmed*; and that that part of the said decree, by which each party was to pay his own costs, be *reversed*; and also *decreed*, that the appellants pay to the appellee all the costs incurred by him in the court of chancery, and in this court.

Pollitt *vs.* Parsons.

June, (E. S.)

Property acquired by an insolvent debtor, after he has been legally discharged under the insolvent law of 1774, *ch.* 28, otherwise than "*by descent, gift, devise, bequest or in a course of distribution*," is not liable for debts contracted prior to his discharge; and if it is liable, it cannot be affected by a *feri facias*, without a *scire facias* having previously issued, if a year and a day has elapsed.

Appeal from the General Court from a judgment of affirmance on an appeal to that court from *Worcester* county court. The plaintiff in the county court, (now appellee,) brought an action of trespass *vi et armis* against the defendant, (the appellant,) for taking his goods and chattels, and converting them, &c. By a statement of the facts submitted to the court for their opinion, it appears that *Samuel Smyly* obtained a judgment in the general court against *Parsons*. After which judgment *Parsons* was, on the 13th of November 1801, regularly discharged under the act for the relief of insolvent debtors, passed in 1774, *ch.* 28. That afterwards, in 1803, a writ of *fieri facias* was regularly sued out upon the above-mentioned judgment, and was directed and delivered to *Pollitt*, then being sheriff of *Worcester* county, who, in virtue of that writ, seized and took into his possession the goods and chattels mentioned in the declaration, and sold them at public sale. That the said goods and chattels were acquired and possessed by *Parsons* after his discharge, by his own industry, and not

1807.

Greene vs Muse

by descent, gift, devise, bequest, or in a course of distribution. Upon this statement, the county court, [*Polk*, Ch. J.] gave judgment for the plaintiff, and the defendant appealed to the general court, where the cause was argued at September term 1804. The general court *affirmed* the judgment of the county court, and said that property acquired by an insolvent debtor, after he has been legally discharged under the insolvent law of 1774, *ch.* 28, otherwise than by "descent, gift, devise, bequest, or in a course of distribution," is not liable for, or subject to, debts contracted prior to his discharge; and if such property is liable, it cannot be affected by a *fieri facias*, without a *scire facias* having previously issued, if a year and a day have elapsed. The appellant appealed to this court, and the cause was argued by

J. Bayly, for the appellant, and by

Wilson, for the appellee.

The Court of Appeals *affirmed* the judgment of affirmance.

June, (E. S.)

Greene *vs.* Muse, *et al.* Lessee.

Where a conveyance had been acknowledged by husband and wife, of the wife's land, and the certificate by the justices stated, that the wife "being first privately examined by us separate and part from her husband, whether she did the same freely, voluntarily, and of her own accord, without being induced thereto by the ill usage or threats of her said husband, or fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily, according to the act of assembly in such case lately made and provided, &c." was held not to pass the estate of the *feme covert* in the land to the grantee.

Appeal from the General Court. The appellee, (the plaintiff in the court below,) brought an action of *ejectment* for a tract of land called *Widow's Purchase*, lying in *Dorchester* county, containing 1000 acres. A case was stated for the court's opinion, which raised the question, how far the acknowledgment, as made by a *feme covert* grantor to a deed of bargain and sale, was effectual to pass her interest in the land conveyed? It was a conveyance from *Joseph Duffin*, and *Eleanor* his wife, to *Thomas Bourke*, under whom the defendant in the court below claimed, for part of the tract of land, for which the ejectment was brought.

The acknowledgment is as follows, to wit: "*Maryland*, *Dorchester* county, to wit: Be it remembered, that on the day and year above written, [1st of August 1778, the date of the deed,] personally appeared before us, the subscribers, two of the justices of the peace for the county of *Dorchester*, the above named *Joseph Duffin*, and *Elenor* his wife,

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Partridge vs Partridge

and acknowledged the within deed, and all and singular the within lands and tenements in the within deed contained, to be the right, title, interest and estate, of the within named *Thomas Bourke*, his heirs and assigns, for ever, agreeable to the true intent and meaning of the within deed; the same *Elenor*, wife of the same *Joseph Daffin*, being first privately examined by us separate and part from her husband, whether she did the same freely, voluntarily, and of her own accord, without being induced thereto by the ill usage or threats of her said husband, or for fear of his displeasure, and having assured us she acknowledged the said deed freely and voluntarily, according to the act of assembly in such case lately made and provided," &c. Which was signed by the justices. The general court at April term 1805, gave judgment on the case stated for the plaintiff, and the defendant appealed to this court, where the cause was argued by

Bullitt and *J. Bayly*, for the appellant, and by
Martin and *W. B. Martin*, for the appellee.

THE COURT of APPEALS *affirmed* the judgment of the General Court.

PARTRIDGE'S Adm'x *vs.* PARTRIDGE'S Adm'x. JUNE, (E. S.)

A devise of lands to a creditor does not extinguish a debt or claim which he has against the testator.

APPEAL from *Dorchester* county court. The appellant, (the administratrix of *Jonathan Partridge*,) brought an action of *assumpsit* against the appellee, (the administratrix of *Isaac Partridge*;) and at the trial of the cause, established by testimony, that *Isaac*, in his life-time, was indebted to *Jonathan*, in his life-time, in a certain sum of money. The defendant then offered in evidence the will of the said *Isaac*, dated the 13 of December 1801, whereby he devised to his father, *Jonathan*, (the plaintiff's intestate,) and his heirs, two tracts of land containing about 206 acres, and also the use of all his other lands for life. He also bequeathed to his said father, all his personal estate, and appointed him executor of his will. It was admitted, that the whole personal estate of *Isaac* was not more than sufficient to pay ten shillings in the pound, and that *Jonathan* had no benefit from the bequest of the personal estate mentioned in the will; but that the same was expend-

1807.

Hampson vs. Edelen

ed by the payment of the debts of *Isaac*. That *Jonathan* accepted and held the lands devised to him by the will, under and in virtue thereof, which was of greater value than the debt claimed by the plaintiff. The defendant then prayed the court to direct the jury, that the debt or sum of money claimed by the plaintiff, was extinguished by the said will, and ought not to be recovered. Which prayer the court, [*Polk*, Ch. J. *Done* and *Robins*, A. J.] granted, and were of opinion that the debt or sum of money claimed by the plaintiff was extinguished by the will, and ought not to be recovered, and did accordingly so direct the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued by

J. Bayly, for the appellant and by

W. B. Martin, for the appellee.

The Court of Appeals *Reversed* the judgment of the county court, and awarded a *Procedendo*.

June (W. S.)

Hampson *vs.* Edelen.

A contract for the purchase of land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, altho' the money is not paid at that time. When the money is paid, the vendee is entitled to a conveyance. A judgment obtained by a third person against the vendor *means* the making the contracted payment of the money, cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the rights of such cestui que trust.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment. But the legal estate in the land is not vested in the judgment creditor, so that he can convert it into money to satisfy his debt, by pursuing the proper means.

Appeal from the Court of Chancery. The bill of the complainant, (the now appellee,) stated, that in September 1797, he purchased a part of a tract of land, lying in *Prince George's* county, called *Stoney Harbour*, containing 163 acres, from a certain *Benoni H. Wade*, at the price of £5 per acre; and on the 24th of December 1797, *Wade* gave him full and absolute possession thereof, and that he has ever since continued in possession. That at the time of the purchase of the land, *Wade* was indebted to the complainant on bond, with *Thomas Mundell* his surety, in the quantity of 15,605lbs. of net tobacco, to be paid at the price of 65 shillings per hundred, the whole amounting to £482 current money, and it was then agreed, that the bond should be received in part payment of the land at the said amount, and the same was accordingly given up to *Wade*. That the complainant continued in possession of the land, and used and cultivated it, and having paid up the whole purchase money, on the 12th of November 1798, obtained a conveyance for the same. That after he had pur-

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chased the land from *Wade*, and had paid the amount of the bond in manner aforesaid, and had been in possession, and had used the land from the month of December 1797 to May 1798, a certain *Bryan Hampson* obtained three judgments against *Wade* at May term 1798, in the general court, on which judgments several writs of *fieri facias* have issued returnable to the next general court at May term 1800, and have been laid on the land of the complainant so as aforesaid bought and paid for, and there will be an immediate sale thereof, unless prevented by this court. That at the time the complainant purchased and paid for the land as aforesaid, he never heard of the judgments against *Wade*, and was wholly ignorant of the same, until the writs of *fieri facias* were about to be laid on the land. That he is advised that, having bought the land, and having been in possession thereof as aforesaid, and having paid to the amount aforesaid, before any judgment was obtained against *Wade*, he is entitled to the aid of this court to secure him in his title to the land. *Prayer* for an *injunction* to enjoin proceedings on the judgments and executions, and for other relief, &c. An injunction accordingly issued.

On coming in of the defendant's answer, and testimony taken under a commission, the case was submitted.

Hanson, Chancellor, (October term 1803.) Whether or not the defendant would have had any ground of relief in case he had filed a bill against *Edelen* and *Wade*, the Chancellor neither will, nor ought to, nor can positively determine. Perhaps the whole of the circumstances of the case may not be before the court. However, as the Chancellor cannot doubt that the complainant, at the time when the judgments in the bill mentioned against *Wade*, had a clear equitable interest in the land mentioned, which has since been conveyed to him, he conceives that it is the duty of this court to protect the said interest—*Decreed*, that the injunction, in this case issued, be perpetual, and that each party pay his own costs. From which decree the defendant appealed to this court.

The cause was argued in this court before Chase, Ch. J. Tilghman, and Nicholson, J

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T. Buchanan, for the appellant. The question is, whether or not a man purchasing land under a parol agreement shall be protected against a judgment creditor, under a judgment rendered against the vendor subsequent to the sale and prior to any conveyance being made for the land? He referred to *Sorrel vs. Carpenter*, 2 *P. Wms.* 482. 2 *Fonbl.* 157. *Worsley vs. The Earl of Scarborough*, 3 *Atk.* 392. *Churchil vs. Grove*, 1 *Chan. Ca.* 35. *Bovey vs. Skipwith*, *Ibid* 201. *Peach vs. Winchelsea*, 10 *Mod.* 468. *Finch vs. Winchelsea*, 1 *P. Wms.* 277. 2 *Pow. on Cont.* 58, 34. *Brandlyn vs. Ord*, 1 *Atk.* 571. *Marlow vs. Smith*, 2 *P. Wms.* 199. *Tourville vs. Naish*, 3 *P. Wms.* 307. *Wigg vs. Wigg*, 1 *Atk.* 384.

Shaaff argued for the appellee.

CHASE, Ch. J. delivered the opinion of the court. In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by *Hampson* against *Wade*.

A contract for land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused.

A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.

DECREE AFFIRMED.

GOVER *vs.* CHRISTIE and JAY.

1807.
JUNE.

Gover vs Christie, &c.

Where A, in consideration of a debt due from him to B, assigns to him (not under the act of 1763, *ch* 23, *s* 9, 10,) the bond of C, and C is or becomes insolvent—On a bill by B against A, to compel payment of the bond so assigned— *Decreed*, that the court of chancery has no jurisdiction; that if the assignment was an extinguishment of the original debt, the complainant was not entitled to relief either at law or in equity; and if the assignment was not an extinguishment of the original debt, the complainant had his remedy at law on the original contract, there being no circumstances disclosed in the bill to make it necessary for him to resort to a court of equity.

APPEAL from the Court of Chancery. The bill of the complainants, *Christie* and *Jay*, stated, that on the 20th of February 1797, *Samuel Willetts*, for full value received, executed a *single bill* to *Gover*, the defendant, promising to pay to him, or order, £233, on or before the 1st of April 1798. That in consideration of a debt due from *Gover* to them, he on the 11th of May 1797, assigned the said single bill to the complainants. That suit was brought on the bill against *Willetts*, in the name of *Gover*, for the use of the complainants. That a judgment was obtained at May term 1800, and an execution issued against the property of *Willetts*, which was returned *nulla bona* to October term following. That no part of the debt was ever paid, except £10 paid on the 30th of September 1797. That *Willetts* has become insolvent, and released by the insolvent law. That the complainants have frequently called on *Gover*, the assignor, and requested payment, which he has refused. That the assignment of the single bill was not made in pursuance of the act of assembly, so as to enable the complainants to proceed at law against *Gover*, the assignor. *Prayer*, for a decree to compel *Gover* to pay the amount of the single bill, (deducting the said payment,) with interest, &c. and for other relief, &c. The *answer* of *Gover* stated, that he assigned the single bill of *Willetts*, and two other bonds to him from other persons, to the complainants, in full satisfaction of the debt which he owed to them, and that they agreed to take said assignments in full satisfaction, without having any further or after recourse to him for the debt due from him to them, or for or on account of the assigned bill and bonds, and upon that condition the assignments were made, and receipt in full was given for the debt due by him to them. That when the assignments were made, the several obligors were in solvent circumstances, and good credit; and that the amounts due on the two bonds have been received by the complainants, and they might have received the amount due on the single bill from *Willetts*, if due and reasonable diligence had been used. The complainants entered a general replication to the answer of the defendant, and a commission issued to take testimony. By the testimony it was proved, that *Willetts* was not solvent and in circum-

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stances to pay his debts to any amount in either of the years 1797, 1798, 1799, or 1800. The case being submitted, the following decree was made by,

Hanson, Chancellor, (December term 1805.) The cause being ready for decision, the bill, answer and exhibits, evidence, and all other proceedings, were by the Chancellor carefully read and considered, and it appearing just and equitable that the complainants should not be excluded from recovering the balance of the debt due from the defendant to them, on account of having received the assignment of a bond from one *Samuel Willetts* to the complainants, inasmuch as the money never was received, and especially, as appears from the evidence in the cause, that he was insolvent at the time the defendant assigned the same to the complainant—*Decreed*, that the defendant pay to the complainants the sum of £216 7 9, current money, stated by the auditor of the court, under the Chancellor's order, to be due, with interest thereon until paid, together with costs of suit. From which decree the defendant appealed to this court.

The cause was argued before Chase, Ch. J. Tilghman, Nicholson, and Gantt, J.

Shaaff and *Harper*, for the appellant, contended, that the complainants had adequate remedy at law, and could not apply to a court of equity for relief. They referred to *Cole v. Garretson*, 1 *Harr. & Johns.* 370. *Forbes vs. Perrie*, *Ibib.* 109. *Winchester*, *et al. vs. Brooke*, *ante* 1.

Johnson, (Attorney General,) for the appellees, cited *Fonbl.* 10, 14. The act of 1763, *ch.* 23, *s.* 9, 10. *Pasley vs. Freeman*, 3 *T. R.* 51.

Chase, Ch. J. delivered the opinion of the court. The court are of opinion, that the court of chancery had no jurisdiction in this case.

If the assignment was an extinguishment of the original debt, the complainants are not entitled to relief, either at law or in equity.

If the assignment was not an extinguishment of the original debt, and the court are of that opinion on consideration of the bill, answer and proof, the complainants had

their remedy at law on the original contract, there being no circumstances disclosed in the bill to make it necessary for them to resort to a court of equity.

1807.

Laidler vs Young

DECREE REVERSED.

LAIDLER *vs.* YOUNG'S Lessee.

JUNE.

APPEAL from the General Court. The appellee brought an action of ejectment in that court to recover a tract of land called *Lee's Purchase*, otherwise called *Laidler's Ferry*, lying in *Charles* county. The defendant, (now appellant,) took general defence. At the trial at May term 1804, the plaintiff offered in evidence a grant for *Lee's Purchase*, dated the 2d of May 1664, to *John Lee;* also the will of *Richard Lee*, the heir of *John*, dated the 3d of March 1714, devising the land to his son *Philip Lee;* also the will of *Philip Lee*, dated the 20th of March 1743, devising the land to *George Lee;* also a deed from *George Lee* to *John Laidler*, dated the 10th of Oct'r 1760, and the will of *John Laidler* dated the 1st of February 1771, devising as follows, viz. "I give and devise to my son *Robert Laidler*, all that tract of land called *Lee's Purchase*, to him and his heirs for ever, together with the lands thereto adjoining; and in case he dies without heirs, to my son *John Laidler*, and the heirs of his body lawfully begotten." He also offered in evidence and proved, that after the death of *John Laidler*, the testator, *Robert*, his son and devisee, entered and was seized of the lands devised to him by the will; and that *Robert*, in his life-time, executed the following lease to the lessor of the plaintiff, viz. "Know all men by these presents, that I, *Robert Laidler*, of *Charles* county, in the state of *Maryland*, for and in consideration of the annual sum of five pounds currency, paying my just debts, and maintaining my sister *Elizabeth Laidler*, have farmed and to rent let unto *Joseph Young*, the plantation whereon I now live, known by the name of *Laidler's Ferry*, for the term of *seven* years from the date hereof. As witness my

A, by his will devised as follows: "I give and devise to my son B, a tract of land, &c. to him and his heirs, forever, and in case he dies without heirs, to my son J, and the heirs of his body lawfully begotten." This devise created an estate tail in B, the devisee.

Under the act of November 1782, *ch* 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate. A common deed of bargain and sale operates to convey the estate and vest a fee simple in the grantee.

If a limited interest is conveyed by a tenant in tail, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held.

A lease for seven years, made by tenant in tail, will have the effect to pass the estate for the term therein expressed.

A mortgage made by a tenant in tail devests the estate tail for a limited time. If the money is paid, the old estate is revived.

An estate tail cannot be devised under the act of 1782, *ch* 20.

The intention and meaning of the legislature are to be collected

from the law itself, and they are not to be restrained by any thing in the preamble,

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hand and seal this eighth day of June seventeen hundred and ninety-nine.

Robert Laidler (Seal.)

Witness,
Adam Rains,
Stephen Moore,
John Slimer.

That *Robert Laidler* died after the execution of the lease, intestate, and without issue, leaving the defendant his heir at law. The defendant then prayed the opinion of the court, and their direction to the jury, that under the lease so executed, the plaintiff was not entitled to recover.

Key, *Mason*, and *J. B. Duckett*, for the defendant, contended, that the lease executed for seven years, by *Robert Laidler* the tenant in tail, did not operate under the act of *November* 1782, *ch* 23, to bar the estate tail created by the will of *John Laidler*, and that upon the death of *Robert Laidler*, the land descended to the defendant. They cited and relied on the statutes, *de donis*, 32 *Hen.* VIII, *ch* 28. 13 *Edw.* I, ch. 1. 4 *Bac. Ab.* tit. *Leases*, (D.) 22.

Martin, (Attorney-General,) *Johnson*, & *T. Buchanan*, for the plaintiff, referred to the same statutes; also 2 *Blk. Com.* 119. The acts of June 1773, *ch* 1; Nov. 1782, *ch* 23; and 1786, *ch* 45. *Todd et ux vs. Pratt*, 1 *Harr. & Johns.* 465. *Paca's Lessee vs. Forwood et al.* 2 *Harr. & M'Hen.* 175.

Chase, Ch. J. *(a)*. The Court are of opinion, that under the act of assembly of *November* 1782, *ch.* 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate; the remainder, whatever it may be, will, in this last case, descend. But if he intends to change the estate tail to a fee simple, then a conveyance and reconveyance to himself are necessary. But if he disposes of the estate, a common deed of bargain and sale will operate to convey the estate, and vest a fee simple in the grantee.

If a limited interest is conveyed, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held.

(a) Done and *Sprigg*, J. concurred.

1807.

Laidler vs Young

The Court have no doubt but that a lease will have the effect to pass the estate, for the term of years therein expressed; for if a tenant in fee simple can lease, a tenant in tail may also.

It was contended, in the case of *Paca's Lessee vs. Forwood et al.* that an estate tail might, under the act of 1782, be devised by last will and testament. But the court said it could not; for they considered the tenant in tail, and the heir, in the situation of joint tenants, and that the estate, upon the death of the tenant in tail, survived to the heir, and as the will would not take effect until after the death of the tenant in tail, the right of the heir, by such death, had already vested.

It has been said, that a mortgage executed by the tenant in tail conveyed the interest. It is not so. When the money is paid, the old estate is again revived, and the mortgage only defeats the estate tail for a limited time.

The intention and meaning of the legislature are to be collected from the law itself, and they are not to be restrained by any thing in the preamble.

Upon the whole, the court are of opinion, that the lease in this case is good and valid in law to pass and transfer the interest in the land to the lessee for the term of years therein mentioned, and when the term of years expires, the remainder-man will take the estate under the will.

The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

The case was argued before TILGHMAN, NICHOLSON, and GANTT, J. by

Key, for the appellant, and by

Johnson, (Attorney General,) and *T. Buchanan*, for the appellee.

THE COURT OF APPEALS *affirmed* the judgment of the General Court.

1807.
JUNE.

M'Elderry vs Smith

If the defendant during the pendency of a *scire facias*, on a judgment against him, shews his lands, the plaintiff, after a *fiat* on the *scire facias*, may issue a *fieri facias*, and levy it on the lands so aliened, without proceeding against the alienees.

A *scire facias* against terretenants is either general, without naming them, or special against them by name.

Whether or not the return made on a *fieri facias* by a sheriff, stating that he had sold a "certain leasehold and near *Baltimore*-town, and adjoining the lands of *G L*., also on about 27 acres of land, more or less, part of *C H* or *T R*, and part of *M N*, lying to the N side of *Fell* street, near *Baltimore*-town," &c. and the sheriff's return on a *venditioni exponas*, issued for a sale of the lands, that he had "made and satisfied plaintiff in part," together with *parol evidence* of the sale of the lands by the sheriff, and his deed thereof to the purchaser, are sufficient to vest the legal title to the lands in the purchaser? *Quære.*

M'ELDERRY vs. SMITH's Lessee.

APPEAL from the General Court. This was an action of ejectment brought to recover two tracts of land, viz. *Cole's Harbour*, and *Mountenay's Neck*, lying in *Baltimore* county. The defendant, (now appellant,) pleaded the general issue. The plaintiff at the trial, at May term 1804, offered in evidence, that *Andrew Stigar*, in his life-time, being seized of four parts or parcels of the two tracts of land for which the ejectment was brought, and being justly indebted to *James Franklin*, in order to secure to him payment of the money due, did, on the 9th of May 1787, execute a mortgage to him of the said parcels of land, to be void upon payment of the money due, on the 7th of May 1789. He also gave in evidence, that no part of the money has been paid; and that the lessor of the plaintiff is heir at law and administratrix of *Franklin*, who died before the institution of this suit. The defendant then offered in evidence, that *Stigar* was seized and possessed of the said four parcels of land before and on the 24th of May 1785. He then offered in evidence a record of a judgment obtained by *Thomas Usher* against *Stigar*, in the general court in May 1785, which judgment was signed on the 24th of that month. And evidence that *Usher* afterwards departed this life on the 1st of January 1786, having by his will appointed *T. Usher*, *J. Donaldson*, and *S. Johnston*, his executors. He also offered in evidence certain records and proceedings of the general court, showing that the said executors afterwards, on the 5th of April 1786, sued out a writ of *scire facias* on the said judgment, the same being then due and unsatisfied; and that a *fiat* was thereon entered at October term 1787. That a writ of *fieri facias* issued on the last mentioned judgment, directed to the then sheriff of *Baltimore* county, on the 17th of July 1788, returnable to the October term following, when it was returned by the said sheriff, thereon endorsed, "made as per schedule, and remains in the sheriff's hands for want of buyers." Which said schedule stated, that "four acres of land near *Baltimore*-town, and adjoining the property or lands of *George Lux*, with all the improvements thereon," were valued by four persons, as appraisers, to £1500, and "about 27 acres of land, more or less, part of *Cole's Harbour* or *Todd's*

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Range, and part of *Mounteney's Neck*, lying to the north side of *Pitt*-street, near *Baltimore*-town," were valued at £12 per acre; and "about 2¼ acres of land in the S. East addition of *Baltimore*-town, lying on *Harford*. and *Eden* streets," were valued at £12 per acre; and "Part of *Todd's Range*, containing 11 acres, more or less, leased to *Peter Shepperd* for £90 pr. annum," was valued at £1500. That a writ of *venditioni exponas* issued to the said sheriff on the 6th of December 1788, commanding him to expose to sale the several pieces or parcels of land, and the money therefrom arising, have before the court at the May term then following; which last mentioned writ the said sheriff returned, thereon endorsed, "made and satisfied plaintiff in part, £485." He then offered in evidence, that *T. Usher* purchased the lands exposed to sale upon the said writ of *venditioni exponas*, from the said sheriff, under the said execution; and that the said sheriff executed to him a deed therefor, which deed the defendant also offered in evidence, dated the 31st of December 1790. He also offered in evidence, that *T. Usher* did duly pay to the said sheriff the purchase money for the land so to him sold; that he entered upon the said land, and was thereof seized; and afterwards, on the 11th of May 1792, for a valuable consideration to him paid by the defendant, did duly execute and deliver to him a deed of bargain and sale for the said parts of the two tracts of land before described. Also, that under that deed the defendant entered, &c. and that *Franklin*, or any person claiming under him, never was in the actual possession of the said lands, but that the same remained in the actual possession of *Stigar*, or those under whom the defendant claims. The plaintiff then prayed the opinion of the court, and their direction to the jury, that on the foregoing statement of facts, if they believe it to be true, the plaintiff is entitled to recover all the lands for which this suit is brought.

Martin, (Attorney-General,) and *Harper*, for the plaintiff, in their arguments cited *Arnott and Copper vs. Nicholls*, 1 *Harr. & Johns.* 471. and *Co. Litt.* 1.

Key, *Purviance* and *S. Chase*, *jr.* for the defendant, in their arguments cited 1 *Blk. Com.* 91, 328. *Cunningham's*

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L. D. tit. *Terretenant. Jacob's L. D.* tit. *Terretenant. Vin. Ab.* 563, 567. 3 *Bac. Ab.* tit. *Execution*, 363. *Com. Dig* tit. *Execution*, (D 1.) 2 *Blk. Com.* 91.

CHASE, Ch. J.*(a)*. In the case of *Arnott and Copper vs Nicholls*, the court considered they might on motion decide whether or not *Goldsborough* was a *bona fide* purchaser, and it turned out that he was a fair purchaser. The *fieri facias* in that case had been taken out after the alienation of the land, and the court thought the alienee should have notice; and that a *scire facias* should have issued to warn him as terretenant; that the whole real estate of the defendant was bound by the judgment, and if there were other alienees, or other real estate, the whole should contribute. That the alienee, having notice, might come in and pay the judgment so as to exonerate the land; and if there was other property than that aliened, the *fieri facias* should be levied of that, before recourse should be had to the land aliened.

The court consider the case of *Arnott & Copper vs Nicholls*, similar to the case at bar in all respects except as to the mortgage.

The mortgagee has a legal title in the land mortgaged, and upon failure to comply with the proviso, by paying the money, the legal title is completely vested in the mortgagee, to be defeated only upon payment of the mortgage money; or in other words, the mortgagee has a legal title in the land, defeasable at law, by redemption at the day, indefeasable at law afterwards.

The mortgagee can bring his ejectment, but the mortgagor may come in and pay the money, and exonerate the land.

At the time the judgment was rendered on the *scire facias*, the mortgagee was terretenant of the land, and the *scire facias* ought to have issued against him to give him an opportunity to plead as terretenant.

A *scire facias* against terretenants is either general or special; that is, either against the terretenants generally, without naming them, or specially against them by name. In the former it may be shown there are others, and in the

(a) Done and *Sprigg*, J. concurred.

latter it is a good plea in *abatement*, that there are others not named.

In this case, instead of issuing the *fieri facias* the party should have taken out a *scire facias* against the mortgagee, the terretenant.

The court therefore give the direction to the jury as prayed by the plaintiff.

The defendant excepted, and the *verdict* and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before TILGHMAN, NICHOLSON, and GANTT, J.

Key and *Shaaff*, for the appellant, stated, that the question for the decision of the court was, whether or not a writ of *scire facias* ought to have issued against the terretenants claiming under the mortgage, where there was an alienation of the land pending the *scire facias* on the judgment? They contended, that a writ of *scire facias* was not necessary, and referred to 2 *Bac. Ab.* tit. *Execution*, (I.) 731. 4 *Com. Dig.* tit. *Execution*, (D 1.) 133. 10 *Vin. Ab.* tit. *Execution*, 563. *Co. Litt.* 290.b.

Harper, for the appellee, cited 6 *Bac. Ab.* tit. *Scire Facias*, (C 5.) 114. *Tully's* case, 2 *Salk.* 598. 5 *Com. Dig.* tit. *Pleader*, (3 L. 14), 783. *Adams and Terretenants of Savage*, 2 *Salk.* 601. *The Earl of Pembroke's* case, *Carth.* 111. *Arnott. & Copper vs. Nicholls.* 1 *Harr. & Johns.* 471. He also objected that the sheriff's returns on the *fieri facias* and *venditioni exponas*, and the sheriff's deed, with the evidence offered, were not sufficient to vest the legal title to the lands in the purchaser; but this objection was afterwards withdrawn, because it had not been made in the court below.

THE COURT OF APPEALS *reversed* the judgment of the General Court.

1807.
JUNE.

Wingate vs Dail

A parol contract between a father in law, and son in law, that the father in law would give a real estate to his grand son in consideration of the son in law paying one half of the value of the land—Not enforced, tho' possession was held by the son in law, and a part of the purchase money paid.

WINGATE *vs.* DAIL.

APPEAL from a decree of the Court of Chancery dismissing the bill of complaint. By the bill, answer, and testimony taken in the cause, it appears that a certain *William Dail*, having a daughter married to *Wingate*, the complainant, entered into a verbal agreement with him to sell to him two parcels of land, on which *Wingate* then resided, for £150, being one half the value of the land; the other half he intended to give to *Wingate's* wife; and that *Dail* often declared that the land was to be deeded to *Wingate's* son. That *Wingate* paid £40 in part of the purchase money, and continued in possession, and paid the taxes on the land, which were charged to him by the direction of *Dail*, and with the approbation of *Wingate*. That *Dail* made an entry in his book of accounts, crediting *Wingate* on the 25th of August 1798, "By cash received for a contract for the plantation where he now lives," &c. £40. That *Dail* afterwards had a son born, named *Joseph*, (the appellee,) and in order to make provision for his son, declared his intention of taking the land from *Wingate*, and giving it to his son, and in lieu thereof to give *Wingate* personal property; which intention was made known to *Wingate*, who was not altogether satisfied with the arrangement. That *Dail* offered to return the £40 to *Wingate*, which the latter did not refuse to take, but said he had no occasion for it, and *Dail* said he would keep it for him until he should call for it. *Dail* afterwards, by his will, devised the land to his son, (the appellee,) and bequeathed sundry slaves to *Wingate's* wife.

HANSON, Chancellor, (2d July 1804.) It appears, that to prevent the setting up of contracts, like the one stated in the bill, was the object of the statute of frauds and perjuries; and this court never did, and never ought, by its decision, to defeat the salutary intent of the act.

It has, indeed, under some circumstances, enforced the performance of parol contracts, but never in a case like the present, where it remains uncertain whether or not there was any contract, and even if there was a contract, it does not appear clearly what was the engagement on the complainant. *Decreed*, that the bill be dismissed, but without costs.

From which decree the complainant appealed to this court.

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Clarke vs Magruder

The cause was argued before CHASE, Ch. J. TILGHMAN, NICHOLSON, and GANTT, J.

J. Bayly, for the appellant, to shew that such a contract ought to be enforced, cited 1 *Eq. Ab.* 21. 1 *Vern.* 363. 2 *Vern.* 455. 2*d pt.* 1 *Eq. Ab.* 32, 42, 44. 1 *Atk.* 12, 15. 1 *Ves.* 83, 221, 297, 441. 2 *Ves.* 299. 3 *Atk.* 4.

Shaaff, contra, contended, that chancery would not enforce a contract which the party who applied to have it enforced had shown an unwillingness to comply with on his part. That a contract, if in writing, would not be enforced if there was proof that it had been rescinded by parol. 1 *Fonbl.* 392, *(note* e.*)*

THE COURT OF APPEALS *affirmed* the decree of the Court of Chancery.

CLARKE *vs.* MAGRUDER, *et al.*

JUNE.

Unless the contrary is proved, it is presumptive evidence that a clerk, who is dead, and who made certain entries on the books of his employer, delivered the goods, as charged

The defendant may set off, against the plaintiff's demand, a note of the plaintiff's accrued subsequent to the commencement of the action

APPEAL from the General Court. This was an action of *assumpsit*, brought by the appellees, (the plaintiffs in the court below,) for goods *sold and delivered*, &c. The writ issued on the 9th of March 1799, and at May term 1802, the action was entered for the use of *Samuel Johnston*, and others. The defendant, at October term 1799, pleaded *non assumpsit*, and issue was then joined. He afterwards, at October term 1801, filed an *account in bar*, and gave notice of a *set off*.

1. The plaintiff, at the trial at October term 1804, produced the original partnership day books in court, and a witness to prove the hand writing of the clerk who made the entries in the books, the clerk being dead. This was resisted by the defendant's counsel.

CHASE, Ch. J. The court have no doubt upon the subject. It is to be presumed, the entries being made in the hand writing of the clerk, that he delivered the goods as charged. The defendant may prove the contrary, and if he does not, it is presumption, on the part of the plaintiffs, that the clerk who made the entries on the books delivered the goods.

2. The plaintiffs then read in evidence the original writ which issued in this case on the 9th of March 1799, (there being no endorsement at that time for the use of *Samuel Johnston*, and others,) and that it was served on the 19th

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of April 1799, with a copy of the declaration and account; and gave in evidence, that at October term 1799, the plea of *non assumpsit* was put in, and issue joined in the cause. They further gave in evidence, that the defendant was indebted to them on the 13th of August 1798, for goods, wares and merchandizes, to him sold and delivered before that time, in the sum of £381 10 3½ current money. The defendant then offered evidence to prove, that on the 24th of August 1798, he paid the plaintiffs the sum of £98 12 6 current money, part of the debt due to them; and that, by his counsel, he gave notice of a set off at October term 1801, of the following note, with the endorsement thereon:

"Baltimore, October 29, 1799.

For Dollars 1270 92. Six months after date we promise to pay to Mr. *P. D. Goverts*, or order, one thousand two hundred seventy dollars and ninety-two cents, for value received. *Wm. B. Magruder* & Co."

Which note was thus endorsed: "I hereby assign and make over all my right, title, claim and interest, of the within note, to *Bailey E. Clark*, for value received, he clearing me of my indorsement, and all possible consequences. *Peter D. Goverts.*"

And the defendant proved the signature to the note, "*Wm. B. Magruder, & Co.*" to be the signature and proper hand writing of the plaintiffs, and the hand writing and signature of *Peter D. Goverts*, to whom the note was made payable. He also gave in evidence, that the entry on the docket of the plaintiff's cause of action for the use of *Samuel Johnston*, and others, was made at May term 1802, and not before. The plaintiffs then produced and read in evidence, by and with the consent of the defendant and his counsel, the certificate of *Peter D. Goverts*, to prove that the defendant, on the 16th of May 1800, and not before, purchased the note from him for the sum of $225. "*Baltimore*, September 12, 1803. I, the subscriber, hereby certify to have sold to Mr. *Baley E. Clarke*, on the 16th of May 1800, Messrs. *Wm. B. Magruder, & Co's* note of hand, drawn in my favour, and amounting to dollars 1270 92 cents, dated October the 29th, 1799, six months after date, for the sum of $225, in consideration of he the said *Clarke* not holding me responsible for my indorsement.

Peter D. Goverts."

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The plaintiffs then prayed the opinion of the court, and their direction to the jury, that the defendant could not avail himself in law of the note so made and endorsed to him as a set off in bar to the residue of their claim.

Key, and *T. Buchanan*, for the plaintiffs, cited and relied upon *Evans vs Prosser*, 3 *T. R.* 186. The act of assem. 1785, *ch* 46. 1 *Esp.* 239. *Bull N. P.* 180. The statutes, 2 *Geo.* II, *ch* 22, *s.* 13, and 8 *Geo.* II, *ch* 24, *s.* 4, 5. 3 *Went. Plead.* 159 to 172. *Imp. C. B.* 204, 254, 294. *Morg. Vad.* 350. *Marsh, et al. vs. Chambers*, 2 *Stra.* 1234.

Mason, for the defendant, cited and relied on *Gassaway vs Dorsey*, 4 *Harr. & M'Hen* 405. *Wolgamot vs Bruner*, 4 *Harr. & M'Hen.* 89. *Baskerville vs. Brown*, 2 *Burr.* 1229. 1 *Esp.* 240. The act of assem. 1785, *ch* 46, *s.* 7. *Barnes's Notes*, 450. *Bull. N. P.* 181. *Collins vs Collins*, 2 *Burr.* 820.

Chase, Ch. J. *(a)*. The court are of opinion, that the defendant is not entitled to the set-off claimed, as his right to the plaintiffs' note accrued subsequent to the commencement of this action. If this set-off was allowed, great mischief would result from it. It would burthen the plaintiff with the costs of suit, although at the time he instituted his suit he had a good cause of action, and against which, at the time, there was no defence, and it would encourage and sanction a practice which ought not to receive any countenance or favour from this court—the practice of buying up claims against a plaintiff, which, instead of promoting, would be a perversion of justice.

The act of assembly, in the opinion of the court, makes no change in the law as to the time the cause of action accrues. It enumerates the cases in which the set-off may be claimed, and allows the defendant to plead it, or give it in evidence on the general issue, on filing his cause of action, and giving notice that he claims to set it off against the plaintiff's suit.

Certainly the act of assembly ought to be liberally construed so as to prevent circuity of action, and to do justice between the parties in the adjustment of their mutual debts, *subsisting* at the time the action was brought; but there would be no liberality or justice in construing it so

(a) Done and *Sprigg*, J. concurred.

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as to sanction and legalize the practice of buying up claims to harass the plaintiff, and burthen him with costs, without any fault in him.

The chief judge observed, that the defendant can avail himself of nothing done during the pendency of the action, unless it has the concurrent act of the plaintiff. The debt must be a subsisting debt at the time the suit is brought. If the defendant pays the debt, or has a release, he must plead it after the last continuance. If a *feme sole* marries pending the suit, it must be pleaded *puis darrein continuance.*

In the case of *Wolgamot vs. Bruner*, there were three pleas, viz. Nothing in arrear, payment, and set-off. There was a demurrer to the last plea, and an exception to the other pleas. The exception was defective; and the only question was upon the plea of set-off, as the party could not take advantage of the exception, it being defective. *Barnes's Notes* was the only case referred to on the set-off. The case of *Sapsford vs. Fletcher*, 4 *T. R.* 511, is certainly good law; it was there considered, that payment to the landlord by the subtenant, is payment to the tenant. All the authorities, both before and since the revolution, concur in establishing that a plea of set-off is not a good plea to an avow in replevin. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

A debt or demand may be set off, or pleaded in discount, altho' it was not subsisting at the time the action was brought.

The cause was argued before TILGHMAN, NICHOLSON, and GANTT, J.

Shaaff, *Johnson*, (Attorney General,) and *Van-Horn*, for the appellant, referred to the statutes of 2 *Geo.* II, *ch.* 22, *s.* 11. 8 *Geo.* II, *ch.* 24, *s.* 4, 5; and the act of 1785, *ch.* 46, *s.* 7. *Collins vs. Collins*, 2 *Burr.* 824. Stat. 8 & 9 *Wm.* III, *ch.* 11. *Evans vs. Prosser*, 3 *T. R.* 186.

Key and *T. Buchanan*, for the appellees, cited *Baskeville vs. Brown*, 2 *W. Blk. Rep.* 293. 2 *Burr.* 1229. *S. C.* 3 *Morg. V. M.* 191, 330. 2 *Harr. Ent.* 468. 3 *Went.* 160. &c. 1 *Esp.* 238, 239.—*Le Bret vs. Papillon*, 4 *East*, 507. *Stone vs. Rafter*, 1 *Harr. & Johns.* 365. *Reynolds vs. Beerling*, 3 *T. R.* 188.

THE COURT of APPEALS *reversed* the judgment of the General Court.

SAUNDERS, *et ux. vs.* SIMPSON, *et ux.*

1807.
JUNE.
Saunders vs Simpson

A specific performance of a bond for the conveying of lands, executed in 1777 by a father, in favour of his daughter, *decreed*, on a bill filed in 1797, although strongly contested on the ground that the bond was never executed, or if executed, that it was obtained by fraud.

An equitable title in the defendant to lands, will not prevent a recovery against him in an action of ejectment bro't by a person having the legal title. (*note*)

APPEAL from a decree of the Court of Chancery *dismissing* the bill of complaint. The bill filed by the present appellants, on the 15th of November 1797, was for a specific performance of the following agreement, executed on the 28th of December 1777, by *William Andrew*, deceased, viz. "*Baltimore* county, to wit. This agreement witnesseth, that whereas I, *William Andrew*, of the said county, did engage and promise to give unto my daughter, *Elizabeth Saunders*, on or before her marriage with Mr. *Robert Saunders*, eight or nine hundred acres of land; and three or four negroes, which land hath since been recovered of me, so that I cannot give her that land I promised; and I, the said *William Andrew*, have now settled the said *Robert*, and *Elizabeth* his wife, on my *Bush River* plantation, called *Jones' Inheritance*, containing three hundred and ninety-six acres, more or less, and also a tract called *Smith's Discovery* thereto adjoining, containing seventy-seven acres, more or less, and do hereby now assign *William Robinson's* bond for the conveying of said last mentioned tract, unto my said daughter *Elizabeth*, her heirs and assigns, and all the estate I can or may claim thereon and thereby, which lands I mean to give her in lieu of the lands so promised to her as aforesaid, which the said *Robert* and *Elizabeth* do now agree to take. And the said *Robert* hath lent and advanced me at several times divers sums of money—Now I, the said *William Andrew*, as well to perform my said promise as aforesaid made, as for the money advanced as aforesaid, and for divers other good causes moving me towards my said daughter *Elizabeth*, do now agree and promise never to remove my said daughter, nor her husband, from the said lands, but they, and each of them, shall and may have and hold the said lands under this agreement, from the date hereof; and I do promise for me, and my heirs, to give, convey, and perfect her title and right to the said lands, I mean to my said daughter, her heirs and assigns, either by my last will, or by deed duly executed, at the end of a lease which I heretofore gave them, so that my said daughter may peaceably possess and enjoy said lands, and her heirs, for ever. In witness

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whereof I have hereto set my hand and seal this 28th day of December 1777.

Sealed and delivered in presence of *Abraham Andrew*, *Averilla Andrew*, *Priscilla Colvin.* *Wm. Andrew*, (L. S.)"

The bill stated, that *Abraham Andrew*, one of the subscribing witnesses to the agreement, was the eldest son and heir at law of *William Andrew*, and that *Averilla Andrew* and *Priscilla Colvin*, were two of his daughters. That *William Andrew* died on or about the 1st of February 1783, having first duly made and executed his last will and testament, by which, after devising a few inconsiderable legacies to his children by his first wife, (one of whom was *Elizabeth*, one of the complainants,) he devised all the rest and residue of his estate to the daughter by his second wife, by the name of *Elizabeth Durbin William Andrew*, which second wife had been the house-keeper for *William Andrew*, and by him kept after he separated from, and during the life of, his first wife, and whom he intermarried with after the death of his first wife, having had issue one daughter, *Elizabeth Durbin William Andrew*, who hath since intermarried with *John Simpson*. That *Simpson*, and wife, claiming the premises by virtue of the will, brought an ejectment in the general court against the complainant, *Saunders*, and recovered judgment for the possession of the same, notwithstanding they knew he claimed the same under the above mentioned agreement. That the complainant not having any other except an equitable interest in the lands, was unable to defend the possession thereof at law, and was obliged to suffer a judgment to be entered against him, and seek his remedy in this court. *(a.)*

(a) In the trial of the ejectment referred to, brought by *Simpson et ux Lessee vs Saunders*, in the general court at October term 1795, for *Smith's Discovery* and *Jones's Inheritance*, the plaintiff proved, that *William Andrew* being seized in fee simple of *Jones's Inheritance*, devised the same to the wife of *Simpson*, one of the lessors of the plaintiff. The defendant then produced the agreement, or instrument of writing, purporting to have been executed by *Andrew*, as set forth in the context, and prayed the court to direct the jury, that if they should be of opinion, from evidence which might be offered, that the said instrument of writing was duly executed, then the effect of the instrument was sufficient to entitle the defendant to their verdict for the tract of

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That *Abraham Andrew* and *Averilla Andrew*, two of the witnesses to the agreement, are since dead, and the complainants were in danger of losing their proof to the execution of the said instrument of writing. *Prayer*, for *subpena*, &c. and that *Simpson* and wife might be compelled to convey the premises in fee unto *Elizabeth*, one of the complainants, and that testimony might be taken and recorded in order to the perpetuating thereof, &c. Also prayer for an *injunction* against proceedings at law on the judgment in ejectment. *Subpena* and *injunction* issued accordingly; and a commission issued *de bene esse* for taking testimony.

The *answers* of the defendants stated, that *Saunders* held the lands mentioned in the bill, during the life-time of *Andrew*, as a tenant, and that the same were never sold, or contracted to be sold by him to the complainants, or either of them, and that the writing, or bond of conveyance, in the bill mentioned, was never executed by *Andrew*, but is a forgery. That *Andrew* devised the land to the defendant, *Elizabeth*.

Much *testimony* was taken under the several commissions which issued for that purpose, and the several exhibits proved.

Exhibit E. Is a letter dated *Middle River Neck*, October 20, 1773, from *William Andrew* to *Robert Saunders*, then of *Queen-Anne's* county, viz. "Daughter *Betsey* has been talking to me about living over here, as she wants to come back, and if you will come over again, you may go to *Bush River* plantation, on halves, for seven years, and then the place shall be hers instead of the land *Bond* has recovered against me."

Exhibit R. Is a letter from *William Andrew* to *Robert Saunders*, without date, but is in answer to one from the latter to the former dated the 8th of December 1781,

land called *Jones's Inheritance*. But the defendant did not offer any evidence to prove the execution of the said writing.

Goldsborough, Ch. J. (*Chase*, J. absent, *Duvall*, J. concurred.) The court are of opinion, that the instrument of writing produced, even though the same should have been duly executed, is not of effect to bar the plaintiff's recovery of the land mentioned. Verdict, guilty as to *Jones's Inheritance*, and not guilty as to *Smith's Discovery*. Judgment on the verdict; from which the defendant appealed to the court of appeals, where the judgment was *affirmed* at November term 1797.

Key and *Winchester*, for the plaintiff and appellee.

Martin, (Attorney General,) and *Hollingsworth*, for the defendant and appellant.

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"As to what you mentioned by *W. Chambers* concerning the company's land, if it runs as you say *(a)*, you had better buy it, as I have no money to spare at this time. I think you may afford to buy that bit; and if you will, I will be up and be your security."

Exhibit X. Is a bond dated the 18th of July 1800, executed by *John Simpson* to *John Colvin*, and conditioned for the conveyance to *Colvin* of 75 acres of land out of *Jones's Inheritance* and *Smith's Discovery*, if ever they should be recovered into the possession of *Simpson*.

Exhibit Z. Is a letter from *Simpson* to *Colvin*, without date, and is as follows: "I have received two letters from you, the first I did not understand, but the second explained your meaning fully, which is, you will have money from me at any rate. First you say, the bond is not valid, now you threaten me with the sale of it. You tell me *Hammond* and I are in collusion. I tell you it is more probable that he and you are in collusion. Was not every thing that was done about that business at the particular request of you and your mother? And pray how is my interest connected with *Hammond's*? Exactly in the same way that I am connected with you, and every other person who has ever done any thing for me in *Maryland*, by paying an extravagant price for it all, or obligating myself so to do. You ask, if I expect to keep the bond until it becomes due, that I deceive myself. In one thing I am sure I am not deceived, that I shall not pay it twice, and I do not conceive it will be more expensive to pay it to another than to you. But you seem to think I must pay it to you, whether I will or not—In this let me tell you, you deceive yourself, and grossly too. You seem to think I cannot do without your mother's testimony, and that it is of essential importance to me. In this you are wrong. You never knew for what purpose I wanted her testimony, nor does she understand it herself, neither would I have told any of you, but it seems necessary to inform you to prevent you running yourselves into infamy, and such difficulties, that it will be impossible to extricate you from. The real intention on my part was to make her testimony good for nothing, which is done, she having already sworn on both sides of the question. Now you expose my bond for sale, the thing

(a) By a plot made of the lands, it appears that this tract run nearly through the middle of *Jones's Inheritance*.

becomes public. It must and will be considered as a bribe for which she has perjured herself. To prevent any consequence of this kind, was my inducement for exacting a promise from you of keeping the thing an inviolate secret, and which you promised on your sacred honour to perform. It was a measure I disliked in every step, but your characters and interest being both connected with keeping the secret, and your most pointed promises so to do, I thought you might be trusted without risk to yourselves; but it appears as if avarice was superior to every other consideration with you, and that without looking forward at all. Would you have a little patience, the business is in such train that it cannot be long until you will get the money; but such imprudence on your part may put it off to a later period. How do you suppose, that in justice to myself I can pay any more money, when there is any uncertainty that I may never get any thing in return for it; and you will positively receive more clear profit on the final issue of this business than I shall. This suit has already cost me upwards of $400, and will yet cost me a sum I cannot calculate, besides a great loss of time. What you get, you get clear, and that without trouble or expense. Had you me in your power in such manner that you could force money from me in this way, would it not amount to absolute robbery? And do I deserve it at your hand in any respect? I have felt myself under obligations to your mother for her friendship, but if she is privy to this business, it is well calculated to cancel them all. I shall be in *Baltimore* in two or three weeks, and hope, in the mean time, you will think more prudently about this business, otherways you must make your best of it, and I shall never have any connexion with either of you again."

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Haxson, Chancellor, (14th of March, 1805.) Without acting against the principles which have governed the Chancellor in several former decisions which have been affirmed on appeal, he cannot grant that which is prayed by the bill. It appears to him indeed, that no bill filed in this court praying a decree to compel a conveyance of land on an alleged contract, has been more weakly supported by the admissions and proofs in the cause. But it would be irksome to the Chancellor, and he conceives it altogether unnecessary for him to give his opinion at large, and to re-

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mark particularly on the testimony. *Decreed*, that the bill be *dismissed*, and the *injunction* heretofore issued be dissolved.

From this decree the complainants appealed to this court, and the case was argued before CHASE, Ch. J. TILGHMAN, NICHOLSON and GANTT, J. by

Martin, *Ridgely*, *Shaaff*, *Johnson*, (Attorney-General,) and *Brice*, for the appellants *(a)*, and by

Key and *Harper*, for the appellees.

CHASE, Ch. J. delivered the opinion of the court. It appears to the court, that the bond dated the 28th of December 1777, from *William Andrew* to *Robert Saunders*, and wife, for the specific execution of which the bill was filed, has been well and sufficiently proved. The letter written by *Andrew* to *Saunders*, dated the 20th of October 1773, shows the foundation on which the bond was executed, and exempts it from suspicion of fraud, or illicit contrivance. The bond may be considered as the fulfilment of the promise, made to the daughter, contained in that letter, and is strongly corroborated by the exhibits *Z* and *R*. The conflicting interests which prevailed in the family on the death of *Andrew*, the disputes consequent thereon, and contrivances formed by the parties to get as much of his property as could be obtained in the general scramble, have exhibited a scene of iniquity and corruption seldom brought to the view of a court of justice.

The conduct of *Saunders*, altho' highly reprehensible, in the methods adopted and pursued by him to get a confirmation of his wife's right to the lands in question, or to secure it to himself, cannot defeat or diminish the wife's equitable right and interest thus acquired by her father's letter, confirmed by the possession given pursuant thereto, and by his bond to *Saunders*.

And for these reasons the court do reverse the decree of the Chancellor, with costs to the appellants; and do decree, order and adjudge, that *Simpson* and wife, by a good and sufficient conveyance in law, do grant, convey and make over, to *Elizabeth Saunders*, and her heirs, for ever, the

(a) They cited 2 *Stra.* 1096. 1 *Blk. Rep.* 365: and 4 *Burr.* 2224, to show that a will might be established though the three subscribing witnesses thereto denied their handwriting.

lands called *Smith's Discovery* and *Jones's Inheritance*; and that *Simpson* and wife be perpetually enjoined from proceeding at law on the judgment in ejectment obtained by them against *Saunders* and wife. 1807. Cheney vs Ringgold.

DECREE REVERSED, &c.

CHENEY vs. RINGGOLD, *et al.* Lessee. DECEMBER.

ERROR to the General Court. The defendant in error brought an action of *ejectment* in that court, for a tract of land called *The Number of Two*, situate in *Washington* county, within the *reserve* of *Conococheague* Manor, and containing 1970 acres of land. The defendant, (the present plaintiff in error,) took defence on warrant, and plots were made. At the trial at May term 1803, the defendant offered in evidence, that several Manors existed in *Maryland* prior to the year 1730, which were the private property of the then Lord Proprietary, and that the following order issued from the Proprietary, on the 28th of June 1731, to lay off reserves on and round his Manors, viz. "Sir, Whereas his Lordship, the right honourable the Lord Proprietary of this province of *Maryland*, hath ordered to make a *resurvey* upon all his Honors, Manors and Lands, and to *enlarge* the same on both shores of this province; I do hereby, in the name and behalf of the right honourable the Lord Proprietary, order and require, that you forthwith cause a reserve to be entered for his Lordship on all vacant lands, rough or cultivated, and on all lands that are or may become escheat or forfeit to his Lordship, *adjoining to any of his said Honours, Manors or Lands*, or within the distance of three miles from them, or any of them; and that you likewise acquaint the several surveyors within this province thereof, that they may behave themselves accordingly. Given under my hand this 28th day of June, Anno Domini 1731.

Bend't. Leon'd. Calvert.

To *Philemon Lloyd* Esquire, Deputy Secretary of *Maryland*.

"In pursuance of the above order, a reserve is hereby made for and to the use of his said Lordship, on all vacant lands, rough or cultivated, and on all lands that are

Whether or not 20 years exclusive and unmixed possession of a tract of land by cultivation and general use, without an actual enclosure, is such a possession as will bar a recovery in ejectment? *Quere.*

Whether or not 20 years possession of a part of a tract of land by actual cultivation and enclosure, with an exclusive and unmixed enjoyment of all exterior to the enclosure, by sparsim cutting, and general user, will bar a recovery in ejectment of the parts not enclosed? *Quere*

Where the plaintiff with title, having possession by enclosure and cultivation of a part of a tract of land, claiming the whole, and the defendant, without title, having possession by enclosure of a part of the same tract, with the use (by cutting timber, &c.) of the other parts not enclosed, the plaintiff is bound by the act of limitations as to that part of the land which is in the possession of the defendant by actual enclosure for more than 20 years next preceding the bringing his ejectment, but not as to the parts used by the defendant exterior to the enclosure.

When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him, having the title,

as in possession to the extent of his right

The act of limitations did not attach or run against the Lord Proprietary on any possession of vacant lands.

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or may become escheatable, or any ways forfeit to his Lordship, adjoining to any of his Honours, Manors or Lands, or within the distance of three miles from them, or any of them. To all concerned." The defendant then read in evidence, the certificate of *Conococheague Manor*, whereby was resurveyed on the 25th of October 1736, by order of *Samuel Ogle*, Esquire, Governor of *Maryland*, for the use of the Lord Proprietary, his Lordship's Manor of land, lying in *Prince George's* county, called *Conegocheig Manor*, according to its first intended bounds, beginning, &c. containing 10,594 acres of land. He then read in evidence the warrant which issued on the 6th of June 1752, to *Charles Cheney*, for 50 acres, he having paid 50s. sterling, caution for the same; and he offered to prove, that in pursuance of that warrant, a survey was made for *Cheney* on the 15th of November, 1752, and a certificate thereof returned in 1762, for a tract of land called *Cheney's Delight*, containing 96 acres of land, to be held of *Conegocheigue Manor*; and that the certificate of survey was examined and passed on the 30th of March 1754, and the composition money was paid thereon in April 1762. He also offered to prove, that *Cheney* immediately after the survey, entered on the land, claiming the whole as his right and property, and died in possession thereof in 1780; and that the certificate of survey, and the land therein included, called *Cheney's Delight*, are truly located by the defendant on the plots in this cause. And that *Cheney* built on, improved and cultivated part, and cut and used the wood growing thereon, claiming the whole until his death, as his right and property; and that the defendant, on the death of *Cheney*, his father, entered on the said land, claiming the whole as his property, according to the location and certificate aforesaid. And that *Cheney*, the ancestor, and the defendant, planted orchards, and held by actual enclosure and cultivation for more than *twenty-seven* years next preceding the bringing of this ejectment, all that part of *Cheney's Delight* which is contained within the lines shaded blue, as located and described on the plots, claiming the enclosed land, and the whole of the tract, as their own proper estate and right; and that all the land, as located within *Cheney's Delight*, exterior to the enclosures shaded blue, has been claimed and used by *Cheney*, and those claiming under him, as part of *Cheney's*

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Delight, exterior to the enclosures shaded blue, has been claimed and used by *Cheney*, and those claiming under him, as part of *Cheney's Delight*, ever since the year 1762, by cutting wood and rail, and other timber thereon, for the use and purposes of their dwelling and farm, on said land; and that no other person whatever has at any time used, enjoyed, or cut any of the wood or timber on the land, except *Cheney*, and that no person has claimed the same, or any part thereof, except that a claim has been set up by the lessors of the plaintiff, and those under whom they claim. That *Cheney's Delight* is included within the lines of a tract of land called *The Number of Two*. The plaintiff then showed in evidence, that on the certificate of survey of *Cheney's Delight*, no patent ever issued, and that the reason why a patent was refused upon that certificate, is indorsed thereon in the words following, viz. "No patent to issue on this certificate, by order of his Excellency, being within the reserve of *Conegocheigue*.

Test. *W. Steuart*, Clk."

He then offered in evidence a patent for *The Number of Two*, (being part of the reserve around *Conegocheigue Manor*,) granted to *John Morton Jordan* on the 15th of July 1768, and which is the land for which this ejectment is brought, and which is truly located on the plots. He then read in evidence a deed from *Jordan* to *Thomas Ringgold*, dated the 26th of October 1770, for the land called *The Number of Two*; also the will of *Thomas Ringgold*, dated the 16th of February 1774, whereby he devised the said land to *Benjamin Ringgold*, his son, in fee simple. And he proved, that *B. Ringgold* died on the 26th of August 1798, without child, and intestate, whereby the said land descended to his three brothers, *Thomas*, *Samuel*, and *Tench*, and his sister *Anna Maria*, who before this ejectment was brought was and still is a married woman, the wife of *Frisby Tilghman;* that the last named *Thomas Ringgold*, by deed of bargain and sale, on the —— day of October 1798, conveyed all his interest in the said land to his two brothers *Samuel* and *Tench*, which said *Samuel* and *Tench*, together with *Frisby Tilghman*, and *Anna Maria* his wife, are the lessors of the plaintiff. That *Jordan*, the patentee, entered upon *The Number of Two*, claiming title to the whole thereof, according to his right, until he sold the same to *Thomas Ringgold*. That *T. Ring-*

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gold, after the conveyance from *Jordan* to him; *B. Ringgold*, after the death of his father, by his guardian and by himself; and the lessors of the plaintiff, after the death of *B. Ringgold*, respectively entered upon the said land, and by himself and themselves, and his and their tenants, possessed and enjoyed a part thereof by actual cultivation and enclosure, and claimed title to the whole thereof, according to his and their respective rights, viz. *T. Ringgold* until his death in November 1776; *B. Ringgold* until his death in August 1798; and the lessors of the plaintiff until the time of bringing this ejectment. That *Jordan* resided in the city of *Annapolis*, distant from the land upwards of 100 miles. That *T. Ringgold*, the elder, resided at *Chester-Town* in this state, distant upwards of 200 miles from the land; and that the guardian of *B. Ringgold*, during his minority, resided upwards of 100 miles from the land. That *B. Ringgold* was born on the 6th of January 1774, and on the 17th of September 1796, in the name of his lessee, he instituted an action of ejectment against the present defendant, in the general court, for the recovery of the land now sued for by the present plaintiff, against the present defendant; and that the action was depending and undetermined when *B. Ringgold* died, and that it did abate by his death, and was so entered at October term 1798. The plaintiff also offered in evidence, by the same witnesses who were examined by the defendant, that they, the witnesses, always understood that *Cheney's Delight* was alleged to lie within the reserve of *Conogocheague Manor*, and therefore the owners of *Cheney's Delight* could not obtain a patent therefor. The defendant then prayed the opinion of the court, and their direction to the jury, that if they find the facts as stated by the defendant, that then the lessors of the plaintiff were barred from making title to any part of *Cheney's Delight*, for the reason that the same was included in the lines of *The Number of Two*, for which the ejectment is brought.

Chase, Ch. J.*(a.)* The court refuse to give the direction prayed, being of opinion that nothing less than twenty years adverse possession, by actual enclosures, will bar or defeat the title of the plaintiff in this case. The defendant excepted. *Verdict* for the plaintiff according to his pre-

(a) Done, and *Sprigg*, J. concurred.

tensions, except as to the lands located on the plots as included in lines shaded blue, as to which, verdict for the defendant. Judgment being rendered on the verdict for the plaintiff, the defendant brought a writ of error to this court.

At December term 1806, the cause was argued before BUCHANAN, NICHOLSON, and GANTT, J.

Key, *Shaaff*, and *Hughes*, for the plaintiff in error, in their arguments cited 3 *Blk. Com.* 209. *Cullen vs. Johnson*, 2 *Stra.* 1142. *Fisher vs. Prosser*, *Cowp.* 217. *Esp. N. P.* 434. *Ridgely's Lessee vs. Ogle & Leonard*, 4 *Harr. & M'Hen.* 123. *Ringgold's Lessee vs. Malott*, 1 *Harr. & John.* 299. *Russell's Lessee vs. Baker*, *Ibid* 71.

Martin, *Mason*, and *Johnson*, (Attorney-General,) argued for the defendant in error.

Curia Ad. Vult.

At this term the court pronounced their judgment.

BUCHANAN, J. The facts stated in the bill of exceptions taken in this case are, that prior to the year 1730, several manors existed in *Maryland*, which were the private property of the then Lord Proprietary; that on the 28th of June 1731, an order issued from the Lord Proprietary to lay off *reserves* on and around all his manors; that an order, the date of which does not appear, issued from *Samuel Ogle*, the then governor of *Maryland*, to resurvey for the Lord Proprietary his manor called *Conogochieque Manor*, in pursuance of which order, that manor was resurveyed, and a certificate thereof, dated the 25th of October 1736, was made out by the proper officer, and returned to the land office; that a reserve was laid off, on and around the said manor, and that afterwards, on the 6th of June 1752, *Charles Cheney* obtained a warrant from the land office; in pursuance of which a survey was made by the proper officer for and in his name, on the 15th of November 1752, of a tract of land called *Cheney's Delight*, and a certificate thereof made out, which was examined and passed by the examiner general on the 30th of March 1754, and returned to the land office on the 17th of April 1762, when the composition money thereon, and the rent to that day were paid, and on the 10th of June 1767, the rent to that time was also paid; that on

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this certificate a patent was refused, because *Cheney's Delight* lay within the reserve of *Conogochiegue Manor*, and that no grant has ever issued thereon; that on the 7th of March 1769, *John Morton Jordan* obtained a patent for a tract of land called *The Number of Two*, being a part of the reserve around *Conococheague Manor*, from whom the legal title to *The Number of Two* is regularly deduced to the lessors of the plaintiff, and that *Cheney's Delight* lies within the lines of *The Number of Two*. That *Charles Cheney*, for whom *Cheney's Delight* was surveyed, and the defendant in the court below, have lived thereon ever since the survey, using the parts exterior to the enclosures ever since the year 1762, by cutting wood, rails, and other timber thereon, for the use and purposes of the farm; and for more than twenty-seven years next preceding the institution of the suit, have been in the actual possession, by cultivation and enclosure, of a part of the land lying within the lines of *Cheney's Delight*, claiming title to the whole; and that the lessors of the plaintiff, and those under whom they claim, have, ever since the grant of *The Number of Two*, possessed and enjoyed a part thereof by actual cultivation and enclosure, claiming title to the whole, according to their right. It is contended, that the order to lay reserves around the manors of the Lord Proprietary, dated the 30th of June 1731, was not applicable to the *Conococheague Manor*, which, as it is said, was surveyed in the year 1736, subsequent to the date of that order; that therefore the reserve on that manor was unauthorised and void, and that a patent for *Cheney's Delight* was improperly withheld. But the certificate of *Conococheague Manor*, dated the 25th of October 1736, is evidently a certificate of resurvey recognizing an original, and having for its foundation an order from the then governor of *Maryland* to resurvey *Conococheague Manor*, and for any thing appearing in the record, the original survey of that manor may have been anterior to the date of the order to lay off reserves. But whether anterior or not, a reserve was made around *Conococheague Manor*, and afterwards the warrant granted to *Cheney* on the 6th of June 1752, was located, (as appears by the aforegoing statement of facts,) within the lines of that reserve; and for that reason it was ordered and determined, that a patent should not issue on the certificate of *Cheney's Delight*. And whether the

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judgment of the judges of the land office, was correct or not, or whether the reserve laid off on *Conococheague Manor* was properly or improperly made, is not now for us to decide, nor is it material in the consideration of this case.

A patent did issue for *The Number of Two*, which does not appear to have been ever vacated; and so long as it remains unvacated, if there is no elder patent covering the same land, or other grant overreaching it in law, (neither of which appears,) it operates to vest in the patentee, and those claiming under him, the title to all the land lying within its lines, whether the order to lay off reserves is applicable to *Conococheague Manor* or not, and whether a patent for *Cheney's Delight* was properly or improperly withheld.

To recover *The Number of Two*, this suit was instituted, and defence was taken for *Cheney's Delight*, which, it appears, lies within the lines of *The Number of Two*, and for which no patent ever issued. Therefore the defence taken, was not on title derived by grant, but grew out of the possession in the defendant, and *Charles Cheney*, under whom he claims, of a part of *Cheney's Delight*, by actual enclosure for more than twenty years before the time of bringing this suit, with a continued enjoyment from the year 1762, of the parts not enclosed, by cutting timber, &c. exterior to the enclosures. Hence the only question is on the operation of the act of limitations upon that possession.

I shall not go into an examination of the questions, whether twenty years exclusive and unmixed possession of a tract of land by cultivation and general use, without an actual enclosure, is such a possession as will bar a recovery in an action of ejectment? Or whether twenty years possession of a part of a tract of land by actual cultivation and enclosure, with an exclusive and unmixed enjoyment of all exterior to the enclosure by sparsim cutting and general user, will bar a recovery in ejectment of the parts not enclosed? For although they are questions of considerable importance in this state, and whatever my opinion touching them may be, yet as they are not involved in this cause, it is not necessary, nor perhaps would it be proper, to decide upon them now.

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The question in the court below grew out of the facts existing in the cause; and that the opinion, from which this is an appeal, was given upon those facts, and with a view to the particular case then under consideration, is evident from the opinion itself, which is in these words: "Nothing less than twenty years adverse possession by actual enclosure will bar or defeat the title of the plaintiff in this case." And I concur with the general court in that opinion, admitting all the facts stated in the bill of exceptions to be true.

This is a case of two conflicting claims, in which the pretensions of both parties are set out. The lessors of the plaintiff with title, having possession by enclosure and cultivation of a part of the tract of land in dispute, claiming the whole; and the defendant without title, having possession by enclosure of a part of the same tract of land, with the use (by cutting timber, &c.) of other parts not enclosed. As to that part of the land which was in the possession of the defendant, and his ancestor, *Charles Cheney*, by actual enclosure for more than twenty years next preceding the bringing of this suit, the plaintiff is bound by the act of limitations; but not as to the parts used by the defendant exterior to the enclosure.

When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him having the title as in possession to the extent of his right.

The act of limitations did not attach or run against the Lord Proprietary on any possession of vacant lands; and even if it could have run against him as to the land in question, he was not barred by the possession of *Charles Cheney* on the 7th of March 1769, the date of the grant of *The Number of Two*.

And whatever might have been the effect in law of the use made by the defendant, and his ancestor, of those parts of *The Number of Two*, claimed by them exterior to the enclosures by sparsim cutting, for twenty years next preceding the institution of this suit, in case the purchaser had never entered and obtained possession before or during that user, and no mixed possession had followed; yet in this case it is stated, that *John Morton Jordan*, the grantee of *The Number of Two*, and those claiming under him, did immediately after the date of the grant, and

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within 20 years from the commencement of any possession in *Cheney*, enter upon and take possession of a part of *The Number of Two*, by actual enclosure and cultivation, claiming title to the whole, and have ever since so possessed and claimed; and the possession of part, gives in law a constructive possession of the whole. This principle may be extended to both parties in this case, and each may be considered as having been in possession of the land claimed by him, according to his right, and the true extent of his lines, with the exception of the parts enclosed by the other—the defendant of *Cheney's Delight*, and the lessors of the plaintiff of *The Number of Two*, which includes all *Cheney's Delight*; or in other words, the defendant of a part of *The Number of Two*, according to certain alleged lines, and the lessors of the plaintiff of all *The Number of Two*, except the parts thereof enclosed by the defendant. Their possessions, therefore, of those parts of *Cheney's Delight* not enclosed, or rather of the unenclosed parts of *The Number of Two*, claimed and used by the defendant, (for there appears to be no such grant as *Cheney's Delight*,) were mixed or conflicting possessions, on which the statute of limitations could not attach or run, so as to bar a recovery by the plaintiff, who, if the facts stated in the bill of exceptions are true, is the legal owner.

Even if the defendant's possession by enclosure commenced first, which is not stated to be the case, that, and his cutting timber exterior to the fences, could not have prevented the constructive possession vesting by operation of law, in *Jordan*, of all the unenclosed parts of *The Number of Two*, on the actual entry and enclosure made by him, and those claiming under him, upon a part of that tract of land, within twenty years from the date of the grant, claiming title to the whole. But if the possession, by enclosure, of the lessors of the plaintiff, and those under whom they claim, commenced first, and for any thing appearing in the record that may have been the fact, surely no cutting, &c. by the *Cheneys*, exterior to their enclosures, could so divest the possession, cast by law upon the plaintiff, of the unenclosed parts of *The Number of Two*, as to let in the operation of the act of limitations.

Upon the whole, I consider the question in this case to be, whether twenty years mixed possession of unenclosed

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lands can operate to bar a recovery in ejectment by the rightful owner, he being one of the possessors?

On this question I feel no doubt, and therefore am of opinion that the judgment of the general court ought to be affirmed.

NICHOLSON, J. concurred.

GANTT, J. dissented.

DECEMBER.

OWINGS *vs.* NORWOOD'S Lessee.

A memorandum made by a clerk in the record of a deed, stating that the date had been altered, &c. is not evidence, how can not done without authority, and will not invalidate the deed.

In executing a commission issued to a foreign country for the purpose of taking testimony, notice is not necessary, but time should be given, that the opposite party might exhibit cross interrogatories.

If the heirs of J. S. in whom was the title to land, were living in *Great Britain* at the passage of the acts of confiscation, then an escheat warrant, issued to E. N. for the said land, issued without authority of law. But a grant to him for the land surveyed under that warrant, came within the provisions of the 8th *section* of the act of *November* 1781, ch. 20.

Such grant is valid to vest the land to E. N. notwithstanding he had not paid more than two thirds of the appraised value of the land.

The plaintiff on a judgment of condemnation on an attachment on judgment, where there was no *fieri facias* and sale of the land condemned, does not acquire a legal estate in the land by virtue of the judgment, attachment and condemnation.

Land liable to confiscation, may be granted by the state, under an escheat warrant.

Such escheat grant will operate by relation so as to give title from the date of the warrant of escheat.

The 8th *section* of the act of *November* 1781, ch. 20, secured the land so escheated to the party, on his paying two thirds of the value.

The state, by its commissioners, was in possession of all *British* property within the limits of the state, under and by virtue of the acts of confiscation.

No *British* subject could hold land in this state on the 19th of November 1794, the time when the treaty with *Great Britain* was made.

Where certain lands would not warrant the proceeding a mortgage made in 1776 was satisfied before 1796, the mortgagee being a resident of *Great Britain*, and altho' he was never in possession of the mortgaged premises—the party not shewing any title under the mortgagor.

Where lands were mortgaged to a *British* subject, on failure of payment of the mortgage money, a complete legal estate vested in the mortgagee, liable to confiscation, and was vested in the state under the acts of confiscation, subject to the right of redemption; and the *British* treaty cannot operate on such a case.

A mere deed of lease and release, not necessary to be recorded, may be read in evidence.

The court would not direct the jury to presume a title had been perfected, deeds having been produced shewing a defective title had been transferred.

The court would not direct the jury that the plaintiff's escheat grant did not pass the land, the defendant claiming the same under a defective title.

APPEAL from the General Court. The appellee brought an action of *ejectment* for a tract of land called *The Discovery*, lying in *Baltimore* county, containing 520 acres and an half acre of land. The defendant, (now appellant,) took defence on warrant, and plots were returned.

1. *First bill of exceptions.* The plaintiff at the trial at May term 1804, read in evidence the patent of a tract of land called *Brown's Adventure*, granted to *Thomas Brown* on the 10th of November 1695, for 1000 acres. Also the grant to *Norwood*, the lessor of the plaintiff, for the tract of land called *The Discovery*, the land mentioned in the declaration, and for which this suit is brought, dated the 25th day of June 1800, and granted in pursuance of a *special warrant of escheat*, obtained by *Norwood* out of the land office, on the 25th of October 1795, to resurvey and affect a tract of land called *Brown's Adventure*, originally, on the 10th of November 1695, granted to *Thomas Brown*, for 1000 acres, who is stated to have died seized thereof

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intestate, and without heirs. In pursuance of which warrant the tract was found to contain, clear of elder surveys, the quantity of 494 and an half acres, to which was added 26 acres of vacant land, and *Norwood*, having paid the treasurer the sum of £578 18 4, being the purchase money due for the escheat land, and £4 17 6, being the composition due for the vacant land added, the state granted to him the land, resurveyed as aforesaid, with the vacancy added, and called *The Discovery*, agreeably to the certificate of survey thereof returned into the land office, bearing date the 25th of April 1796. The plaintiff also offered in evidence, that *The Discovery* is included within the lines of the patent for *Brown's Adventure*. The defendant then offered in evidence, that the great grandson, and heir at law of *Thomas Brown*, the first patentee, and others his descendants, are alive at this time in this state. The plaintiff then read in evidence an office copy of a deed from *Thomas Brown*, the patentee, to *John Gadsby*, bearing date the 2d of May 1700, for the land called *Brown's Adventure*, purporting to be sealed and delivered by *Brown*, in the presence of *Cha. Carroll* and *Thos. Bland*, and having the following indorsements: May 4th, 1699. Then received of the within named *John Gadsby*, the sum of two pounds sterling, being for the fine due the right honourable the Lord Proprietary, upon the alienation of the land within mentioned. As witness my hand.

Cha. Carroll.

"*Memorandum.* That the date of this was originally according to the date of the above receipt, but aliened by consent of the provincial court and parties, to bring it within the act of assembly.

"*W. Taylard.*

"*Memorandum.* This day, to wit, the tenth day of October, in the twelfth year of his Majesty's Reign, &c. *Anno Dom.* 1700, came into the provincial court the within named *Thomas Brown*, and *Kath* his wife, and the said *Kath* being secretly examined according to law, they did acknowledge the land and premises within mentioned to the within named *John Gadsby*, to be his right as of their gift, according to the act of assembly in that case made and provided. Taken and acknowledged in court.

"*W. Taylard*, Clk."

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The defendant then produced the record book, containing the said deed, with its several indorsements, and prayed the opinion of the court, and their direction to the jury, that if they were of opinion that the indorsements were made at the request of *John Gadsby*, the grantee in the deed named, and with his privity and consent, and that the deed, with the several indorsements, was recorded for his benefit, and with his assent, that then the indorsements on the deed by the plaintiff produced, are competent to be read in evidence to support the facts therein contained, against the title of *Gadsby*, to the land in the deed mentioned.

Chase, Ch. J. (a.) The court are of opinion, that the memorandum on the deed from *Thomas Brown* to *John Gadsby*, endorsed, to wit—"Memorandum. That the date of this was originally according to the date of the above receipt, but altered by consent of the provincial court and parties, to bring it within the act of assembly. *W. Taylard*"—is not evidence, being an act done by *Taylard* without authority, and that the deed is valid and operative in law to transfer the land to *Gadsby*.

Sprigg, J. observed, that when he sat alone at the trial of this case at the last term, he considered the memorandum as having been made by an officer having authority to make it; but since, upon reflection, he finds that he was wrong in the opinion which he gave. He concurs with the court in the opinion given, that it was an act done by *Taylard* without any authority. The defendant excepted.

Notice is not necessary on executing a commission to take testimony in a foreign country

2. The defendant then offered to read in evidence a commission, issued from this court on the 12th of November 1802, and certain depositions taken thereunder, and returned to this court on the 10th of April 1804. It appears that the defendant had, at May term 1801, obtained a commission to *London* for the purpose of taking testimony, and as the cause was then standing for trial, the commission was granted, with a proviso, that if it was not returned at the next term it would be no cause of continuance at that term on the part of the defendant. At Oc-

(a) *Done*, J. concurred.

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tober term 1801, the defendant filed *interrogatories*, and took out duplicate commissions. At May term 1802, the commission and depositions were returned, and the plaintiff obtained a continuance of the cause, and also a commission to *London* upon the same terms, that if it was not returned at the next term, it would be no cause of continuance, &c. At October term 1802, the defendant had leave to renew his commission upon the same terms as were originally granted, and he filed *additional interrogatories*, and issued the commission, and sent a copy of his original and additional interrogatories with the commission, which was returned, with depositions, as before stated, and were now offered to be read, but which were objected to by the plaintiff's counsel.

Chase, Ch. J. It appears that two terms have intervened since the commission was taken out by the defendant, and the plaintiff had sufficient time to send forward his interrogatories. The oath which the commissioners take, shows that they may receive additional interrogatories at any time before the commission is closed. In executing foreign commissions, notice is not necessary; but time should be given, that the opposite party might exhibit cross interrogatories. The court are of opinion, that the testimony taken under the commission may be read in evidence to the jury.

3. *The second bill of exceptions.* The plaintiff then produced in evidence a deed from *John Gadsby* to *John Barker*, dated the 10th of July 1701, for 130 acres, part of *Brown's Adventure*, describing the part by courses and distances, and calling the same *Barker's Inheritance*. Also a deed from *Gadsby* to *Aaron Rawlings*, for all the residue of *Brown's Adventure*, not conveyed to *Barker*, dated the 2d of October 1703. Also a deed of mortgage from *Aaron Rawlings* to *Jonathan Scarth*, dated the 18th of May 1706, for all the land included in the patent of *Brown's Adventure*, except the 130 acres conveyed to *Barker*, which deed of mortgage was to be void, &c. on payment of £800 sterling money, with interest, on the 13th of May 1709. He then offered evidence, that *Barker* and *Scarth* died before the year 1795, without heirs. He then offered in evidence an escheat warrant, to affect by escheat the whole of *Brown's Adventure*, for the want of

An escheat warrant could not legally issue to effect land if the heirs of the grantee were living in *Great Britain* at the time of the act of confiscation; but a grant for the land surveyed under that warrant came within the provisions of the act of November 1781 *ch.* 20 *s.* 8.

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the heirs of *Thomas Brown*, or "be it escheat by the means aforesaid, or by any other way or means whatsoever," granted to the lessor of the plaintiff on the 28th of October 1795; also a *certificate* upon that warrant, returned to the land office on the 29th of September 1796; also a *caveat* against a grant's issuing on the certificate by *Edward Dorsey*, on the 26th of August 1796; also a second *caveat* entered against a grant's issuing thereon by *William Hammond* on behalf of *The Baltimore Company*, on the 10th of January 1797; also an order of the judge of the land office dismissing the caveat of *Hammond* on the 30th of September 1797; also an order of the judge of the land office permitting the caveat of *Dorsey* to be withdrawn, and that the same was withdrawn on the 24th of June 1800; and also a *patent* issued upon the certificate to the lessor of the plaintiff for the land therein mentioned called *The Discovery*, bearing date the 25th of June 1800. He then offered evidence, that *Brown's Adventure* and *The Discovery* are truly located upon the plots as the plaintiff hath thereon located them. The defendant then offered in evidence, that the descendants and heirs at law of *Brown*, the original patentee, were at this time in full life in this state; and that *Scarth*, the mortgagee in the deed from *Rawlings*, died in *Great Britain*, having always resided there, leaving issue an only son and heir at law, who during his life always lived, and died in *G. B.* and left issue an only child his daughter and heir at law, who always resided in *G. B.* and married *Francis Moore*; that she and *Moore* her husband, having always during their lives resided in *G. B.* afterwards died, leaving *Frank Moore* of *G. B.* their only son and heir at law, who is now in full life residing in *G. B.* where he always has resided, a *British* subject. The defendant then prayed the court to direct the jury, that the warrant of escheat which issued to the lessor of the plaintiff, issued without authority of law, the property being in the *state of Maryland* as confiscated property, and not liable to be affected by a warrant of escheat.

Chase, Ch. J.*(a.)* The court are of opinion, that if the heirs of *Scarth* were living in *Great Britain* at the passage of the acts of October 1780, *ch.* 45, *ch.* 49, and *ch.* 51, that

(a) Done, J. concurred. *Srigg*, J. gave no opinion.

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the warrant of escheat which issued to the lessor of the plaintiff, issued without authority of law; but that a patent which issued on such warrant came within the provision of the act of November 1781, *ch.* 20, *section* 8.

A grant of land as escheat, which was liable to confiscation, is valid notwithstanding the grantee had not paid more than two-thirds of the appraised value of the land

4. *The second bill of exceptions in continuation.* The defendant then offered in evidence the valuation of the land so escheated by the lessor of the plaintiff, and the sum by him paid into the treasury for the land on the 24th of December 1799, and that the sum so paid was only *two-thirds* of the appraised value of the land so escheated. And he then prayed the opinion of the court, and their direction to the jury, that if they were of opinion that the lessor of the plaintiff had only paid *two-thirds* of the appraised value of the land so escheated, that then he could not entitle himself to the benefit of the warranty contained in the act of November 1781, *ch.* 20, *s.* 8.

Chase, Ch. J.*(a.)* The court are of opinion, that if the jury believe the facts stated, that then the patent was good, valid and operative in law, to pass the land to the lessor of the plaintiff, and his heirs, notwithstanding he had not paid more than *two-thirds* of the appraised value, the court considering his case as coming fully within the provision of the *eighth section* of the act of November 1781, *ch.* 20, and that *two-thirds* of the value of the land was as much as he was liable to pay. The defendant excepted to this last opinion, and to so much of the preceding opinion as declares the patent to come within the provisions of the *8th section* of the act of November 1781, *ch.* 20.

The legal title to lands condemned under an attachment, cannot be acquired without a *fieri facias* and sale of the lands so condemned

5. *The third bill of exceptions.* The defendant then read in evidence a record of the late provincial court of *Maryland*, of a judgment for *attachment*, recovered in that court at April term 1732, by *Littleton Waters* against *Jonathan Scarth*, for £397 9 6, sterling money, and costs; also a record of that court of a writ of *attachment* issued on that judgment by *Waters*, on the 15th of November 1736, against the goods, chattels and credits, of *Scarth*; and a return made on that writ by the sheriff of *Baltimore* county, to whom it was directed, certifying that he had attached, as the goods and chattels of *Scarth*, a tract of land called *Brown's Adventure*, containing 870 acres, and

(a) Done, J. concurred. *Sprigg*, J. gave no opinion.

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which he had caused to be appraised, &c. and an appraisement of the said land, amounting to £304 10 0 sterling money; upon which return judgment of condemnation in the usual form, was rendered at May term 1737. Other records of attachments and condemnation against sundry garnishees, and other lands to the amount of £298 12 6 sterling, were offered in evidence. The plaintiff, to show that the land, part of *Brown's Adventure*, affected by the attachment, was the 386 acres, located by him upon the plots, as the land, part of *Brown's Adventure*, in the possession of *The Baltimore Company*, read in evidence the late Lord *Proprietary's old rent roll* (a), kept and remaining in the land office, showing that *Rawlings* was in possession of 870 acres, and *Barker* was in possession of 130 acres, of that land; also the *Proprietary's last rent roll* (b), showing that *Scarth* was in possession of 419 acres, and *Charles Carroll, Esquire, & Company*, (commonly called *The Baltimore Company,*) were in possession of 386 acres of that land; also the *Proprietary's debt book* for the year 1734, which is the oldest debt book known of, or can be found, wherein it appears, that *The Baltimore Company* stand charged with quit rents upon the 386 acres of land, part of *Brown's Adventure*, and no more; and that *Scarth*, in those debt books, stands charged with the quit rents upon 419 acres, part of that tract; and that the respective charges against *The Baltimore Company*, and *Scarth*, are continued, in like manner, upon the Proprietary's debt books, from the year 1734 until the commencement of the revolution between *Great Britain* and *America*. The defendant then prayed the opinion of the court, and their direction to the jury, that by virtue of the judgment, attachment and condemnation, by the plaintiff given in evidence, a legal estate was vested in *Littleton Waters* in the tract of land called *Brown's Adventure*.

Chase, Ch. J. The court are of opinion, that *Littleton Waters* did not acquire a legal estate in *Brown's Ad-*

(a) Made about the year 1708 it is supposed, but there is no date to it.

(b) Made about the year 1730 it is supposed, but there is no date to it.

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venture by virtue of the judgment, attachment and condemnation. The defendant excepted.

6. *The fourth bill of exceptions.* The defendant then read in evidence an act of assembly of November session 1797, *ch.* 119, entitled, "an act to relinquish the right of this state to the lands therein referred to," and prayed the opinion of the court, and their direction to the jury, that by virtue of that act, the right of the state was so far vested in the persons possessing *Brown's Adventure*, under the condemnation aforesaid, that the lessor of the plaintiff could not in virtue of his warrant, certificate of survey and patent, have any right or title to the said land, or if any, then no more than the proportion or compensation to which a discoverer of confiscated property is entitled.

The right of an escheator of land liable to confiscation, attached on his obtaining his warrant, and it was saved by the proviso in the 2d section of the act of 1797, ch 119; and the grant to him operates to transfer the state's interest in the land

Chase, Ch. J. The court are of opinion, that the right of the lessor of the plaintiff to *Brown's Adventure*, attached on his obtaining his warrant of escheat, and that his right was saved and protected by the proviso in the *second section* of the act of November session 1797, *ch.* 119. And the court are of opinion, that the grant to the lessor of the plaintiff operates to transfer to him the interest the state had in the land called *The Discovery*, from the time of the obtention of his warrant of escheat. The defendant excepted.

7. *The fifth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that if the warrant of escheat, which issued to the lessor of the plaintiff, issued without authority of law, that then the warranty contained in the act of November 1781, *ch.* 20, *s.* 8, did not operate to give title to the lessor of the plaintiff; and that there can be no *relation* to a warrant which issues without authority of law, or to a certificate made in pursuance of such warrant.

The act of Nov 1781, ch 20, s 8, secured to an escheator the land by him escheated, though liable to confiscation, on his paying two thirds of the value; and the grant of the land to him operated by relation to the date of the warrant of escheat

Chase, Ch. J. The court are of opinion, that the act of November session 1781, *ch.* 20, *s.* 8, did secure to the lessor of the plaintiff the land so by him escheated, on his paying two-thirds of the value of the land, being what he was liable to pay for the same as confiscated *British* property; and that the grant obtained by him did operate to

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pass the land to him by relation, from the date of the warrant. The defendant excepted.

Under the acts of confiscation, the state by its commissioners was in possession of all *British* property within the state

No *British* subject could hold land in this state on the 19th of November 1794

8. *The sixth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that if *Brown's Adventure* belonged to a *British* subject at the time of passing the act confiscating *British* property in this state, and if no actual possession had been taken thereof by the state, or its agents, and no sale or disposition made thereof, by the state, to any person, at any time before the *treaty* between the *United States* and *Great Britain*, dated the 19th of November 1794, took effect, that the lessor of the plaintiff could make no title thereto by his warrant, certificate of survey and patent.

CHASE, Ch. J. The court are of opinion, that the state, by its commissioners, was in possession of all *British* property within the limits thereof, under and by virtue of the act of confiscation, October 1780, *ch.* 45, and the act of the same session *ch.* 49, to appoint commissioners, &c. and that the possession of the land was in the state at the time the lessor of the plaintiff obtained his escheat warrant; and that no *British* subject could hold land in this state on the 19th of November 1794, the time when the treaty was entered into between *Great Britain* and the *United States* of *America*. The defendant excepted.

Where a mortgage was executed in 1705 to J. S. of *Great Britain* who granted there, and never was in possession of the land mortgaged, and the mortgagor had in 1764 devised the land to his sons, no presumption could arise in favour of a person with 40 years exclusive possession, he not deriving title under the mortgagee, that the mortgage had been satisfied before the year 1760

9. *The seventh bill of exceptions.* The plaintiff then offered in evidence, that *Scarth* died before the year 1795, without heirs, and that *Barker* left heirs now living in this state. Also an escheat warrant, to affect by escheat the whole of *Brown's Adventure*, except the 150 acres conveyed to *Barker*, granted to the lessor of the plaintiff, &c. The defendant then offered in evidence, that the lineal descendants, and heirs at law of *Brown*, the original patentee, were at this time living in this state. Also, that *Rawlings*, the grantee, died leaving heirs, and that the heirs and descendants of *Rawlings* are at this time living in this state. Also, that the descendants, and heirs at law of *Scarth*, are at this time alive and residing in *Great Britain;* and that *Scarth* was a merchant in the year 1706, residing in *London*, trading to the then province (now state,) of *Maryland;* and that *Scarth*, and his descendants and heirs at law, have from the year 1796, in succession, severally resided in *Great Britain* to this time, being *British*

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subjects, and never were in this state. Also the will of *Rawlings*, dated the 25th of March 1741, thereby devising that his lands, called *Brown's Adventure* and *Young's Lot*, be equally divided between his sons and daughters. Also that *Waters* is dead, and that his descendants and heirs are now living in this state. Also that *The Baltimore Company*, under whom the defendant claims, have been for fifty years last past in the actual possession and user of the whole of *Brown's Adventure*, by clearing and cutting the wood off the land for their iron works, and claiming the land; and that there has been no actual or mixed possession of any part of the land by *Scarth*, or by any person claiming under him, or by any person claiming adverse to *The Baltimore Company*. The defendant then prayed the opinion of the court, and their direction to the jury, that if they find the facts stated by the defendant to be true, and that no payment of principal or interest due on the mortgage from *Rawlings* to *Scarth* was at any time paid, made or done, on or after the 13th of May 1709, that then the jury may and ought to presume the mortgage satisfied before the year 1780, and that the plaintiff is not entitled to recover.

Chase, Ch. J. The court are of opinion, that the facts stated will not warrant the jury in presuming the mortgage was satisfied before the year 1780, inasmuch as *Scarth* was continually a resident of *Great Britain*, and although he never entered into possession of the land; yet a possession of *The Baltimore Company* of 50 years will not authorise the presumption of the payment of the mortgage money, as the defendant has not deduced or shown any title in them from *Rawlings*; and therefore the court refuse to give the direction prayed. The defendant excepted.

Lands mortgaged to a *British* subject were liable to confiscation where the time limited for payment of the money had elapsed, subject to a right of redemption, and the *British* treaty cannot operate in such a case

10. *The eighth bill of exceptions.* The defendant then prayed the opinion and direction of the court to the jury, that if the facts are found true, as stated by the defendant, that then the acts of confiscation, of October 1780, *ch.* 45, and *ch.* 49, vested no beneficial interest in this state in the lands mentioned in the mortgage from *Rawlings* to *Scarth*, but that the same, if it vested in this state under the act of confiscation, was liable to the equity of redemption in the heirs of *Rawlings*, the mortgagor, and that by operation of the *British* treaty, so far as the mortgagee could claim an

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interest in the mortgaged lands, the same was saved from confiscation by that treaty, and consequently the plaintiff is not entitled to recover.

Chase, Ch. J. The court are of opinion, that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee, liable to confiscation, and was vested in the state in virtue of the act of confiscation of October 1780, *ch.* 45, and the act of the same session, *ch.* 49, to appoint commissioners, &c. subject to the right of redemption in the mortgagor, and his heirs; and that the *British* treaty cannot operate to affect the plaintiff's right to recover in this ejectment. The defendant excepted.

Ancient deeds of lease and release, not necessary to be recorded, admitted in evidence

11. The defendant then offered to read in evidence an *original lease* and *release* from *Waters* to *Benjamin Tasker*, and others, *(The Baltimore Company,)* which are not to be found upon any of the records of the state, and which are dated, the *lease* on the 20th, and the *release* on the 21st of June 1738, reciting the judgment obtained by *Waters*, in the provincial court, for the condemnation of *Brown's Adventure*, mortgaged by *Rawlings* to *Scarth* the 13th of May 1706, as the effects of *Scarth*, &c. and conveying to *Tasker*, and others, so much and such part of *Brown's Adventure* as should, according to the valuation, upon oath, returned into the provincial court, amount to £145 1 5 sterling money, &c. Neither of which deeds appear to have been *acknowledged*. The plaintiff objected to the reading of the deeds in evidence.

Chase, Ch. J. The court are of opinion, that the lease and release, being ancient deeds, not necessary to be recorded, may be read in evidence to the jury. They were accordingly read to the jury.

There can be no presumption that a title had been perfected, where deeds are produced showing a defective title had been transferred

12. *The ninth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that if they find the facts true, as stated by the defendant, that then the deeds of lease and release from *Waters* to *Tasker* and others, conveyed a legal title in the lands therein mentioned; and that if a legal title did not pass, that then the jury may and ought to *presume* a title in *Tasker* and others, to the whole of an undivided 386

acres of land, being an undivided part of the 870 acres of land, mortgaged to *Scarth*, called *Brown's Adventure*.

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CHASE, Ch. J. The evidence will not warrant the court to direct the jury to presume that *Scarth* perfected the title of the defendant, deeds having been produced showing that a defective title had been transferred. Until all the money was paid, *Scarth* was not bound to convey or diminish the security he had acquired for the whole debt due to him. The court refuse to give the opinion and direction as prayed. The defendant excepted.

The court would not direct the jury that the plaintiff's escheat grant did not pass the whole of the land therein, the defendant claiming a part thereof under a defective title

13. *The tenth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that as to all that part of *Brown's Adventure*, contained in the deeds from *Waters* to *Tasker* and others, under whom the defendant claims, the patent granted to the lessor of the plaintiff doth not give him a title thereto, or enable the plaintiff to recover the same.

CHASE, Ch. J. The court refuse to give the opinion and direction prayed.

The defendant excepted. The verdict and judgment being for the plaintiff, the defendant appealed to this court, where the cause was argued at December term 1806, before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J.

Martin, *Key* and *Harper*, for the appellant, in their arguments on the *first* bill of exceptions, contended, that every deed, to give it validity, must contain, at common law, 1. Indentation. 2. Sealing. 3. Delivery; and superinduced by the act of 1699, *ch.* 42, two other requisites, 1. It must be acknowledged; and 2. It must be enrolled within twelve months from its date. They also contended, 1. That the deed from *Brown* to *Gadsby* appeared to have been executed *in pais* before *Carroll* and *Bland*, and sealed and delivered in their presence. 2. That the receipt of the alienation fine, as endorsed on the deed, stated that it was paid to *Carroll* on the 4th of May 1699. 3. That there was strong evidence of the execution of the deed on that day, because *Carroll*, who gave the receipt, was a witness to its execution. 4. That it was unusual to pay the alienation fine before the execution of the deed, as it could not be demanded before execution, being a duty arising on the actual alienation, and not before. 5. That

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it was further established by the act of the clerk of the court, who officially certified the alteration of the date, as a proceeding in court by the consent of the court and the parties; which, when done, admitted the deed to be recorded. 6. That it was the official act of the clerk could not be doubted, because it was made under the eye of the court, and with their consent, and endorsed on the original deed. 7. That it was endorsed at the request of the grantee, for his benefit, and to explain the date of the alienation fine. 8. That the memorandum, after so great a lapse of time, was the best evidence of the fact, and ought therefore to have been admitted in evidence as the act of the clerk in open court, with the consent of the court and the parties to the deed. They referred to *Gilb. L. E.* 108. *Markham vs. Gonaston*, *Cro. Eliz.* 626. *Cospey vs. Turner*, *Ibid* 800. *The State vs. Oden* (a). *Russell's Lessee vs. Baker*, 1 *Harr.* & *Johns.* 71. *Hoddy's Lessee vs. Haryman*, 3 *Harr.* & *M'Hen.* 581. *Wood vs. Owings & Smith*, 1 *Cranch*, 259.

On the *second* bill of exceptions they contended, 1. That the land was not liable to escheat, there being heirs of *Scarth;* and they referred to the several acts of confiscation of October 1780, *ch.* 45, *ch.* 49, and *ch.* 51. 2. That this was not a case within the warranty of the act of November 1781, *ch.* 20, *s.* 8. They cited 1 *Blk. Com.* 91. 3. That the land was liable to confiscation, and the title to it could only be obtained in a particular manner—by sale and deed; and that the land office had no power or authority over confiscated lands. They referred to acts of 1784, *ch.* 81; 1785, *ch.* 66, *ch.* 88; 1788, *ch.* 49; 1789, *ch.* 47; 1791, *ch.* 77, *s.* 8; 1792, *ch.* 81, *s.* 6; 1793, *ch.* 64; 1795, *ch.* 6; 1796, *ch.* 12; 1799, *ch.* 80, *s.* 6; and 1800, *ch.* 62, *s.* 6. 4. That the patent was made without au-

A executed a bond to B, and delivered it to C, to be delivered to B—*Held* not to be the act and deed of A, it not having been received by B.

(a) In the case of *The State vs. Oden*, in the general court at May term 1790, in debt on bond, the defendant pleaded *non est factum*, and that the bond was delivered as an *escrow*. At the trial the plaintiff offered to prove, that J. S. was indebted to the state, and that the defendant was indebted to J. S; that it was agreed that J S. should give up to the defendant his bond, and that the defendant should execute his bond to the state for the sum which he owed to J. S.—which was done. That the defendant's bond was presented to the state's agent, but which was refused to be received in discharge of the debt due to the state by J. S, and upon which bond this suit was brought in the name of the state for the use of J S. The GENERAL COURT refused to direct the jury that the bond was the deed of the defendant.

thority, and was void. They cited *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 121.

On the *third*, *fourth*, and *fifth* bills of exceptions, they contended, 1. That this land was held under a judgment of condemnation on attachment. They referred to the act of 1715, *ch*, 40. Stat. 5 *Geo.* II. *ch.* 7. *Plater's Lessee vs. Hepburn*, 3 *Harr. & M'Hen.* 434. *Davidson's Lessee vs. Beatty*, *Ibid.* 594. The act of 1797, *ch.* 119. 2. That if it could not be legally held under that judgment, it was embraced by the releasing act of 1797, *ch.* 119, unless it came within one of the provisos. 3. That the *second* proviso could not aid the appellee, for two reasons—1st. because *Norwood* was not an informer against *confiscated* lands; and 2d. because the rights of informers extended not to the land, but to a certain part of the price. They referred to the acts of 1785, *ch.* 88, *s.* 3; 1788, *ch.* 49, *s.* 2; 1789, *ch.* 47, *s.* 20; 1790, *ch.* 65; 1791, *ch.* 77, *ch.* 90; 1792, *ch.* 81; 1794, *ch.* 40, *s.* 7; & 1800, *ch.* 62. 4. That the only remaining question was, whether *Norwood* came within the *first* proviso; that is, whether at the time of passing this act, (21st January 1798,) he had a right in or to this land? They contended that the grant to *Norwood* could have no relation to the date of the escheat warrant, which had illegally issued; nor to the date of the certificate of survey, which was equally illegal, as there could be no relation to an illegal or tortious inception of title. They cited 3 *Coke*, 286, 29. a. 2 *Ventris*, 200. *Townsend vs. Ash*, 3 *Atk.* 340. *Co. Litt.* 310, b. 3 *Shep. Abr.* 150, 151, 152. *Howard vs. Cromwell*, 4 *Harr. & M'Hen.* 325, and 1 *Harr. & Johns.* 115. *Peter vs. Mains*, 4 *Harr. & M'Hen.* 423. *Hammond vs. Norris*, in the General Court, (see *post.)*

On the *sixth* and *eighth* bills of exceptions, they contended, 1. That the confiscation act excepted debts, and, by an equitable construction, it excepted all the incidents to and securities for debts. They cited *Pow. on Mort.* 13, 15, 16, 178, 179. 2. That if mortgages were affected by the act of confiscation, still the treaty of peace protected them, and operated as a repeal *pro tanto*. They referred to the treaty of peace of 3d of September 1783, *Art.* 4, 5, 6. *Ware vs. Hylton*, 3 *Dall.* 199. *Clerke vs. Harwood*, *Ibid* 342; and the treaty of the 19th of November 1794, *Art.* 9.

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On the *seventh* bill of exceptions they contended, that the nature and length of the possession of the appellant, and those under whom he claimed, to the exclusion of all others, and there being no demand of the mortgage debt, were sufficient for the court to have directed the jury to presume the mortgage debt had been satisfied.

On the *ninth* and *tenth* bills of exceptions, they cited *Warren vs. Greenville*, 2 *Stra.* 1129. *Bridges vs. The Duke of Chandos*, 2 *Burr.* 1065. *Anonymous* Case, 1 *Ventris*, 257. *The Mayor of Hull vs. Horner*, *Cowp.* 102. *Eldridge vs. Knott*, *Ibid* 214. *Cocksedge vs. Fanshaw*, *Dougl.* 119. 12 *Coke*, 5. The act of 1797. *ch.* 119. *Carroll et al. Lessee, vs. Norwood*, 4 *Harr. & M'Hen.* 287.

Ridgely, *Mason*, and *Johnson*, (Attorney-General,) for the appellee, in their arguments on the *first* bill of exceptions, insisted, 1. That the acknowledgment of the deed from *Brown* to *Gadsby* was no proof that there was a delivery before that time. 2. That the memorandums taken together, prove that there was a delivery at that time. They cited *Smartle vs. Williams*, 1 *Salk.* 280. *Markham vs. Gonaston*, *Cro. Eliz.* 626, 627.

On the *second* bill of exceptions, they contended, 1. That the land was liable to escheat, and that the escheat grant was *prima facie* evidence of an escheat. That if *Scarth*, or his daughter, died after the 4th of July 1776, and before the act of confiscation, then the land escheated to the state, as the next heir being an alien could not inherit; and that it was incumbent on the appellant, who claimed against the escheat grant, to prove that this did not happen. 2. That admitting the land to have been liable to confiscation, and not escheat, still the grant ought to pass it; because, at the time of the grant, the price of escheat and confiscated lands were the same. 3. That at the time of making the grant, the chancellor had authority to grant confiscated lands under the acts of 1793, *ch.* 64, and 1795, *ch.* 6. 4. That he had general authority to judge and decide in disputes respecting the title of confiscated lands, and that he did so on *Hammond's* caveat: and his decision ought to be final under the acts of 1785, *ch.* 66: April 1787, *ch.* 30, *s.* 4, and 1789, *ch.* 35, *s.* 4. 5. That the grant was protected by the warranty clause in the act of November

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1781, *ch.* 20, *s.* 8. They referred to 2 *Blk. Com.* 249. The several acts of confiscation before referred to; and the acts of November 1781, *ch.* 20, *s.* 8, *s.* 6, 17; 1793, *ch.* 64; 1795, *ch.* 6; 1785, *ch.* 66, *ch.* 88, *s.* 3; and April 1787, *ch.* 30, *s.* 4. *Wynne vs. Wynne*, 1 *Wils.* 43. *Goodtitle vs. Bailey*, 2 *Coup.* 600. *Walton vs. Shelley*, 1 *T. R.* 296. *Buckland vs. Tunkard*, 5 *T. R.* 578. *Rex vs. The Bishop of Chester*, &c. 2 *Salk.* 561. *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 140. *Hammond et al. Lessee, vs. Norris*, in the general court, (see *post*). *Goodtitle vs. Morgan*, 1 *T. R.* 758. *Gittings, jr. Lessee vs. Hall*, in the general court, (see *post* 112.)

On the *third* bill of exceptions they referred to the acts of 1715, *ch.* 40, *s.* 7, and 1797, *ch.* 119. *Rex vs. Deane*, 2 *Show.* 85. *Taylor vs. Cole*, 3 *T. R.* 296. *Davidson's Lessee vs. Beatty*, 3 *Harr. & M'Hen.* 594.

On the *fourth* bill of exceptions they referred to the acts of 1797, *ch.* 119; November 1781, *ch.* 20, *s.* 6, 8; and 1789, *ch.* 35, *s.* 5.

On the *seventh* bill of exceptions they contended, that the mortgage from *Rawlings* to *Scarth*, by lapse of time and the long possession of the mortgagee, had become an absolute estate, and the equity of redemption was gone. They cited 1 *Fonbl.* 323. 2 *Fonbl.* 269. *Cook vs. Arnham*, 3 *P. Wms.* 288, *(note)*.

On the *eighth* bill of exceptions they referred to the acts of April 1782, *ch.* 60, *s.* 7, 8; and 1784, *ch.* 81. *Strithorst vs. Græme*, 2 *W. Blk. Rep.* 723.

On the *ninth* and *tenth* bills of exceptions they cited *Denn vs. Barnard*, 2 *Coup.* 597. *Davidson's Lessee vs. Beatty*, 3 *Harr. & M'Hen.* 594.

Curia ad. vult.

The Court of Appeals, at this term, *affirmed* the judgment of the General Court, concurring in the opinions expressed in all the bills of exceptions.

The appellant considered this was a case arising under a treaty, within the meaning of the constitution of the *United States*, and that the supreme court had appellate jurisdiction therein, he therefore sued out a writ of error under the provisions of the 25th *section* of the act of congress, entitled, "An act to establish the judicial courts of the *United*

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States," passed the 24th of September 1789; but the supreme court, considering it not to be such a case, dismissed the writ of error. 5 *Cranch*, 344.

DECEMBER.

HALL vs. GITTINGS *Junr's.* Lessee.

GITTINGS *Junr's.* Lessee vs. HALL.

No adversary possession of land can avail against the state.

Lands which escheated to the Lord Proprietary, were by the acts of October 1780, *ch.* 45, and *ch.* 49, confiscated to and vested in the state, without office found, or an actual entry.

An adversary possession commencing against the Proprietary, ceased to operate against the state after the act of confiscation.

The act of October 1780, *ch.* 49, vested the seizin and possession of all lands liable to confiscation in the commissioners, on behalf of the state, and divested the possession of all other persons

If two persons are in possession of land, the one by right, and the other by wrong, it is the possession of him who is in by right.

If land liable to escheat is included in a survey and grant under an escheat warrant on another tract of land, such grant will operate to pass a good title to the land so included, if there has been possession and payment of rent to the state for more than 20 years before the act of confiscation.

Land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards became escheat, will not pass under such grant, and the state is not estopped from granting it to any other person.

An escheat grant relates to, and operates to pass the whole of the original tract escheated.

If there are two descriptions of the land conveyed, the one by metes and bounds, &c. the grant will operate to pass the land according to that description which is most beneficial to the grantee.

If the testimony of a witness is intended to be objected to because of his holding adjoining lands, &c. his interest must be stated on the plats.

The declaration of a former holder of the adjoining lands, as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plats that he was interested in establishing the truth of the facts related by him.

Whether or not a will was legally executed and proved, are matters of fact for the jury: and where the will was made in 1655, they may and ought, from the length of time elapsed, to presume that it had been duly executed and proved.

The jury were directed on certain evidence of title and descent, that if true, then land which had been granted as escheat land and was not escheatable, as the for upwards of 200 years no person ever claimed the land under the original grantee.

In ejectment the plaintiff must recover on the strength of his own title. The defendant may prevent his recovery, by showing a title in himself, or ever subsisting title in a stranger.

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land, i. e. he who hath the *jus possessionis*.

A title existing title, outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties.

Land is not escheatable as long as there are heirs of the original tenant or grantee.

A grant is that possibility of interest which reverts to or devolves on the land upon the failure of heirs of the original grantee, and he cannot grant the land again until that event happens; and if he does his grant will pass nothing.

An escheat grant is *prima facie* evidence of title; but being only a presumption of right in the Proprietary, it only exists until the contrary is proved.

Nothing but 20 years adverse possession can defeat a title acquired under a legal grant.

The jury were directed, that if they believed certain facts, then the presumption of law was, that *C. H.* for whom the land in dispute was surveyed on the 14th of October 1663, and granted to him the 16th of August 1664, was seized thereof at the time of his will dated the 19th of February 1654, and his death in 1655, and that the land passed to his devisee under the residuary clause in his will.

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ly entered on and became possessed *pro ut lex postulat*, of the lands located on the plots in this cause, surrounding red M, N and P, claiming the same as his own, and in virtue of his patent for *Tolly's Purchase*. That the land included in the black lines on the plots shaded yellow, surrounding red M, and the land in the blue shaded lines surrounding red N, and the land in the yellow lines surrounding red P, were in the year 1774 actually enclosed by *Tolly*, and that he died in the year 1783, in the actual seizin and possession, (so far as he could be seized and possessed thereof against the state,) of the land so enclosed, and devised the same to the wife of the defendant. That the defendant, in virtue of his marriage and the devise, entered upon the said lands in the year 1783, (so far as he could be seized and possessed against the state,) claiming the same, and hath ever since remained in such seizin and possession thereof. That the whole of the three pieces of land has been under actual enclosure of fences from the year 1774 to this period, by *Tolly* in his life-time, claiming the same, and from the time of his death by the defendant, claiming the same. That *Tolly* in his life-time, and the defendant since his title accrued under the devise, and his entry, have paid quit rents to the Proprietary in his time, and taxes and assessment to the state, since the year 1780, for *Tolly's Purchase;* and that no actual entry ever was made by the state, or any person on behalf of the state, on any of the lands herein before described, except the surveyor, who on the 30th day of March 1796, entered on the same to make the survey, on which the lessor of the plaintiff afterwards obtained a patent including the said lands, for the recovery of which this suit is instituted. The plaintiff then prayed the opinion of the court, and their direction to the jury, that they being satisfied as to the true location of *Holland's Park*, the same being land *escheated* to the Proprietor, and by the act of confiscation vested in the state, no adversary possession on the part of the defendant can avail against the state, *so long as the title thereof remained in the state.*

Martin, (Attorney-General,) and *Mason*, for the plaintiff, referred to the acts of assembly of October 1780, *ch.* 45, and *ch.* 49.

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Key, *Hollingsworth* and *Harper*, for the defendants, cited *Kelly's Lessee vs. Greenfield & Sothoron*, 2 *Harr. & M'Hen.* 121. *Russell's Lessee vs. Baker*, 1 *Harr. & Johns.* 71. *Ringgold's Lessee vs. Malott*, 1 *Harr. & Johns.* 299. 2 *Blk. Com.* 75, 257. *Murray & Sansom vs. Ridley's Adm'x.* 3 *Harr. & M'Hen.* 171. The acts of assembly, October 1780, *ch.* 51, *s.* 5; and Nov. 1781, *ch.* 20, *s.* 8, 17. *Burgess vs. Wheat*, 1 *Wm. Blk. Rep.* 174.

Chase, Ch. J. (a). The court are of opinion, that there is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October 1780, *ch.* 49, the state became actually possessed of the land; and that act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the right of the crown, to wit, an office found, or an actual entry. By an office found in *England*, the crown becomes actually seized and possessed of any escheat land in question. The state then had the right to pass the act of assembly; and by that act, the state by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims.

This case has been argued upon the principle of the land's being held under the idea of its being part of *Tolly's Purchase*. The court consider it as distinct from *Tolly's Purchase*, and as having no connexion with the question. It has also been contended by the defendant's counsel on the principles decided in former cases. The court do not consider this case as affected by former decisions. In *Kelly's Lessee vs. Greenfield & Sothoron*, and *Russell's Lessee vs. Baker*, the lands had been granted by common warrants, and afterwards taken by escheat warrants, and there the grantees under the common warrants, had had the adversary possession for the full length of time, to wit, 20 years. But in this case the state, by the act of 1780, having vested complete possession in its commissioners, the adversary possession, (as stated in the case, commencing at farthest in 1774,) could only have continued till the passing of that act. If there had been a subsequent entry and possession of the land by the defendant, or those under whom

(a) *Duvall* and *Done*, J. concurred.

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he claims, there must then have been a continuance for 20 years of that adversary possession to defeat the right of the state's grantee.

The opinion of the court, as contained in the bill of exceptions which was taken at the trial, is as follows, viz. "The court are of opinion, and so direct the jury, that in this case the act of assembly which passed in October 1780, *ch.* 49, vested the actual seizin and possession of the said land in the commissioners appointed to preserve confiscated *British* property, as fully and amply as if the said commissioners, as the agent or trustees of the state, had made a formal entry on the same. That the commissioners were in possession of the said land in virtue and by operation of that act, from the time of passing the same; and although the defendant, or those under whom he claims, continued in the actual possession of the said land, it was the possession of the commissioners on behalf of the state; for where two persons are in possession, the one by right, and the other by wrong, it is the possession of him who is in by right.

"The court are also of opinion, that the possession of the defendant, or those under whom he claims, was divested by the said act of assembly, and that the act of limitations ceased to have operation, or to run from that time, and that he has no right to the said land in virtue of the said possession. That the said possession not being derived from the Proprietary, but taken and held in opposition to his title, the defendant cannot have any equitable interest in the land, or claim to the same upon the state, as standing in the place of the Proprietary." The defendant excepted.

2. The plaintiff, to make title to the land called *Friendship Compleated*, in the declaration of ejectment mentioned, read in evidence the grant thereof for 39 and one quarter acres and 20 perches, surveyed on the 30th of March 1796, for, and granted on the 14th of March 1798 to, the lessor of the plaintiff, in virtue of a special warrant of escheat issued on the 29th of April 1795, to resurvey and affect a tract of land called *Holland's Park*, granted to *George Holland*. He also read in evidence the grant of *Holland's Park*, surveyed the 14th of October 1683, and

Where land liable to escheat, was included in a survey and grant under an escheat warrant on another tract, such grant operated to pass a good title to the land so included, if there had been possession and payment of quit rents for more than 20 years before the act of confiscation. But if the land was not escheatable at the time the escheat grant was obtained, the state was not estopped from granting it to any other person. An escheat grant relates to the original grant.

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granted the 10th of August 1684, to *George Holland*, for 150 acres. The defendant then, in order to make title to that part of *Tolly's Purchase* surveyed the 15th of December 1737, for and granted to, *Walter Tolly*, on the 14th of August 1759, read in evidence the grant thereof, being in virtue of a *special warrant of escheat* upon *Cullen's Lot*, granted to *Thomas Greenwin* for 300 acres, and *Cullen's Addition*, granted also to *Greenwin*, for 500 acres. He then read in evidence the will of *Tolly*, the patentee, dated the 26th of July 1781, by which he devised *Tolly's Purchase* to the wife of the defendant, who is still living; and he proved that *Tolly* died, possessed thereof, in the year 1783. He then offered evidence to prove, that from the time of the grant for *Tolly's Purchase*, the quit rents on that tract had been paid by *Tolly*, to the agents of the Lord Proprietary, until the year 1776, and that the other taxes and county assessments imposed on lands had also been paid by *Tolly*, and those claiming under him, for *Tolly's Purchase*. He then offered evidence to prove, that from the time of obtaining the grant for *Tolly's Purchase* to the present time, *Tolly*, and those claiming under him, have been in the possession and occupation of that land, claiming title to the same. He then offered evidence to prove, that his location of *Tolly's Purchase*, and for which he has taken defence, and which is described by the plots and the table of courses No. 15, is the true original location of that land, and that part of the plaintiff's pretensions for *Friendship Compleated*, interferes with, and runs foul of *Tolly's Purchase*. He then prayed the opinion of the court, and their direction to the jury, that admitting *Holland's Park*, mentioned in the grant of *Friendship Compleated*, was liable to escheat at the time of the survey and grant to *Tolly's Purchase*, and part thereof was included in the grant of *Tolly's Purchase*, then the subsequent grant of the escheat on *Holland's Park*, called *Friendship Compleated*, to the lessor of the plaintiff, could not operate to give him title for any part of the land which was included in the escheat grant to *Tolly*.

Harper and *Johnson*, for the defendant, cited 4 *Bac. Ab.* tit. *Estoppel*, 107. *Co. Litt.* 47, 227, a. 352, 58. 4 *Co.* 53.

Martin, (Attorney-General,) and *Mason*, for the plaintiff, cited *Coke Litt.* 3. 4 *Bac. Abr.* tit. *Estoppel*, 107. *The*

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Proprietary vs. Jennings et al. 1 *Harr. & M'Hen.* 92. *The State vs. Reed*, 4 *Harr. & M'Hen.* 6.

CHASE, Ch. J. The court are of opinion, and so direct the jury, that if *Holland's Park* was escheatable at the time of the grant of *Tolly's Purchase*, and possession and payment of quit rents followed for more than twenty years before the act of confiscation, then the grant for *Tolly's Purchase* operates to convey a good title to all the land contained within the lines of the grant. But if *Holland's Park* was not escheatable at the time the grant of *Tolly's Purchase* was obtained, that in such case no part of *Holland's Park*, which is included within the lines of *Tolly's Purchase*, passed to *Walter Tolly* under the grant, and the state was not estopped from granting *Friendship Compleated* to the lessor of the plaintiff.

The chief judge observed, that the court considered this decision conformable to that in *Kelly's Lessee vs. Greenfield & Sothoron.* He cited *Blackston vs. Johnson*, in the general court for the *Eastern* shore, where he said it was decided, that an escheat grant related to the original grant. The defendant excepted.

An escheat grant will pass all the land comprehended within the true location of the tract of land escheated.

If there are two descriptions of the land conveyed, one by name, and the other by metes and bounds, &c. the grant will operate to pass the land according to that description which is most beneficial to the grantee

3. The defendant then, to support his location of *Tolly's Purchase* on the plots, offered in evidence the certificate and grant of that land, surveyed (in virtue of a special warrant of escheat,) on the 15th of December 1757, for, and granted on the 14th of August 1759, to *Walter Tolly*. In which it was stated, that there "was laid out for *Walter Tolly* the tracts of land called *Cullen's Lot*, and such part of the tract of land called *Cullen's Addition*, as is escheat, according to their ancient metes and bounds, as showed. Beginning for *Cullen's Lot* at a bounded red oak, being the second boundary of the land called *Truman's Acquaintance*, and running thence N W 96 perches, N E 500 perches, S E 96 perches, and then with a straight line to the beginning, containing and laid out for 300 acres more or less. Beginning for the part of *Cullen's Addition*, supposed to be escheated, at the end of the N E 500 perches line of the land called *Cullen's Lot*, and running thence N E 142 perches, S E 284 perches, S W 142 perches, and then with a straight line to the place of beginning, containing and laid out for 252 acres more or less." *Which being reduced into one entire tract*—"Beginning at a bounded red oak, it

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being the original beginning tree of *Cullen's Lot*, and the second boundary of *Trueman's Acquaintance*, and running thence N W 96 perches, N E 642 perches, S E 284 perches, S W 142 perches, N W 188 perches. and then with a straight line to the beginning, containing and laid out for 552 acres, more or less." He also offered in evidence the certificate of survey of a tract of land called *Double Purchase*, surveyed on the 29th of January 1785, for, and granted the 11th of October 1796 to, *Aquila Hall*, the defendant. In which it is stated, that there "was laid out for the said *Hall*, in virtue of a special warrant dated 22d of December 1784, by directions of the commissioners for confiscated *British* property, 166 acres of land, lying within the reserve of *Gunpowder* Manor, a tract or parcel of land adjoining *Gunpowder* Manor, and adjoining a tract or parcel of land called *Tolly's Purchase*, beginning at a bounded stone set up by the said *Hall*, at the end of 784 perches, on the first line of *Gunpowder* Manor, and running thence with and bounding on the manor reverse of the same S 39° 52′ W 784 perches, to a stone marked W T, being the beginning of the manor, and a boundary of *Tolly's Purchase*, and the second boundary of *Cullen's Lot*, thence bounding on *Tolly's Purchase* N E 784 perches, and thence by a straight line to the beginning, containing and laid out for 166 acres more or less." He also offered in evidence that *Tolly*, the patentee of *Tolly's Purchase*, died in March 1783, seized of the lands contained within the metes and bounds of that tract, according to the said location; and by his will devised that tract to the wife of the defendant, who hath since the death of *Tolly*, continued in the actual seizin and possession thereof, until this time. He also offered in evidence that he purchased of this state some time in the year 1785, the tract of land called *Double Purchase*, as located on the plots, as part of *Gunpowder* Manor, which manor is also located on the plots, and obtained a grant therefor from the state on the 11th of October 1796. He also offered in evidence that *Tolly*, during his life, and before and until the *American* revolution, paid the quit rents due upon *Tolly's Purchase* to the agents of the Proprietary down to the year 1776; and after that time he, the defendant, paid the taxes due thereon under the laws of this state. The plaintiff then offered in evidence a certificate of survey of *Cullen's Lot*,

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(surveyed for *James Cullen* on the 17th of June 1683, under a warrant dated the 20th of April 1683,) "lying in *Baltimore* county, at the head of *Gunpowder* river, on the N side of the S branch of the said river, beginning at a bounded red oak, the bounded tree of the land called *Trueman's Acquaintance*, and running from the said oak N W for breadth 96 perches, to another bounded red oak, then with a line drawn N E for the length of 500 perches to a bounded poplar, then running S E 96 perches to a bounded red oak, from thence with a straight line drawn S W to the first bounded tree, containing 300 acres." Also the certificate of survey of *Cullen's Addition*, (surveyed for *James Cullen* the 25th of September 1683, under a warrant dated 30th of July, 1683,) "lying in *Baltimore* county, upon the head of a river called *Gunpowder* river, beginning at the end of the N E line of the land called *Cullen's Lot*, and running from the end of the said N E line N E 284 perches, from thence with a line drawn S E 284 perches to a marked poplar, then running S W 284 perches, from thence running by a direct line to the first bounded tree, containing 500 acres more or less." He also offered in evidence that *Cullen's Lot*, *Cullen's Addition* and *Tolly's Purchase*, are truly located on the plots by him the plaintiff. The defendant then prayed the opinion of the court, and their direction to the jury, that no boundary being called for at the end of the first line of *Tolly's Purchase*, and the second line not calling to bind on or run with any other land, the said first line must stop at the number of perches called for, and cannot be extended further.

Chase, Ch. J. The court are of opinion, that the true and legal exposition of the grant of *Tolly's Purchase* was to convey all the land comprehended within the true location of *Cullen's Lot*, and that part of *Cullen's Addition* which was escheated. That where there are two descriptions of the land intended to be conveyed, the one by name, and the other by metes and bounds, or courses and distances, the grant will operate to pass the land according to that description which is most beneficial to the grantee.

The chief judge observed, that if A. is possessed of two tracts of land, *Black Acre* and *White Acre*, and grants *White Acre*, the youngest tract, by metes and bounds, which metes and bounds interfere with the lines of *Black*

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Acre, then the grantee takes by metes and bounds; for the deed must be taken most favourable for the grantee. This question, he said, was decided in the late provincial court, and affirmed in the present court of appeals *(a)*. The defendant excepted.

If the testimony of a witness is intended to be objected to because of his bearing adjoining lands, his interest must be located on the plots

4. The plaintiff, to establish the location of *Thompson's Choice*, as located by him on the plots, gave in evidence a plot of the lands called *Thompson's Choice*, *Cullen's Lot*, *Cullen's Addition*, *Hill's Forest*, *Tasker's Camp*, *Holland's Park*, (the last tract granted to the defendant.) and *Jamaica*, which plot was made by a certain *Darby Ensor*, a witness sworn in this cause; and the plaintiff offered to prove by *Ensor*, that the said plot was made by him from runnings directed by the defendant, and made by him, *Ensor*, as deputy surveyor of *Baltimore* county, in virtue of a warrant of resurvey issued from this court in an action of ejectment brought therein by the lessee of the present defendant against a certain *Thomas Gittings*. And the plaintiff offered also to prove, by the testimony of *James Gittings*, of *Thomas*, that the place where *Ensor* run from as the beginning of *Thompson's Choice*, in the said runnings from which the said plot so produced was made, was the same place as located on the plots in this cause at black H. But the defendant objected to *James Gittings*, of *Thomas*, being sworn in chief, and that he was not a competent witness to prove that the place where the defendant had directed *Ensor* to run from, in the runnings from which the said plot was made, was the same place which is located by the plaintiff on the plots at H; and offered to prove to the court, that *James Gittings*, of *Thomas*, was the owner of a part of *Thompson's Choice*: and produced the certificates of the surveys of *Hill's Forest*, and *Holland's Park*, granted to *George Holland*. The former of those tracts was surveyed on the 4th of October 1684, and the latter on the 14th of October 1685, and they are both stated as lying in *Baltimore* county, in the woods, above the head of a river called *Gunpowder* river. The former tract began at a bounded red oak standing at the end of the N line of *Thompson's Choice*, and the latter began at a bounded tree standing at the end of *Hill's Forest*.

(a) Hawkins vs. Hanson, 1 *Harr. & M'Hen.* 523.

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CHASE, Ch. J. The court are of opinion, that *James Gittings*, of *Thomas*, be admitted as a witness to prove the fact stated by the plaintiff. The Chief Judge cited *Hawkins vs. Beanes & Middleton*, 2 *Harr. & M'Hen.* 119. *Chapline vs. Keedy*, 3 *Harr. & M'Hen.* 578, and *Gittings vs. Hall*, 1 *Harr. & Johns.* 23, to show that it had been decided, that if the testimony of a witness, who is interested, is intended to be objected to, the land, in which the witness is alleged to be interested, must be located on the plots. The defendant excepted.

The declarations of a former holder of the adjoining lands, as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plots that he was interested in establishing the facts related by him.

5. The defendant produced a witness, who deposed, that 18 years ago he lived with *Charles Ridgely*, who had then purchased part of *Trueman's Acquaintance*, a tract of land located on the plots. That *Ridgely* told him that an agreement had been before entered into between *Thomas Gittings*, the owner of *Thompson's Choice*, and *James Greenfield*, the owner of part of *Trueman's Acquaintance*, (which part he had sold to *Ridgely*;) that the place designated on the plots as the end of the first line of *Thompson's Choice*, according to one of its locations as made on the plots, should be fixed as one of the boundaries of that part of *Trueman's Acquaintance*, which *Greenfield* had held and sold to *Ridgely*. The plaintiff then prayed the court for their opinion and direction to the jury, that the declarations of *Ridgely*, (who is dead,) so given in by the witness above stated, was incompetent and inadmissible, he, *Ridgely*, being interested in establishing the truth of the facts by him related to the witness.

CHASE, Ch. J. The court are of opinion, that the declarations of *Ridgely* are competent and admissible evidence to the jury, it not appearing to the court, by the plots, that he was interested in establishing the truth of the facts related by him to the witness. The plaintiff excepted.

Whether or not a will made in 1683 was legally executed & proved, are matters of fact for the jury: and they ought, from the length of time which has elapsed, to presume that it had been duly executed and proved.

6. The defendant, in order to show that the land claimed by the plaintiff was not escheatable for the want of the heirs of *George Holland*, the patentee, offered to read in evidence an exemplification of the will of *Holland*, taken from the records of the late prerogative office, dated the 19th of February 1683, whereby, amongst other things, he devised as follows, viz. "And all the rest of my lands,

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goods and chattels, I give and bequeath unto *John Larkin*, of *Ann-Arundel* county aforesaid, innholder, and to his heirs and assigns for ever." The will was signed, sealed, and attested thus:

"*George Holland*, (L S.)

"Signed, sealed and delivered,
in the presence of
Wm. Lathorp,
Ann ✕ *Tovey*,
Diana D. Parkes."

And thus endorsed: "June the 22d, 1685. came before me *William Lathrup* and *Anne Tovey*, *alias Joce*, the said *Lathrupe* took his corporal oath, that the within was signed, sealed and delivered, as the act and deed of the said *George Holland*. *Ann Tovey*, *alias Joce*, took her corporal oath that she did believe that the within signed was her mark—the said *Diana*, *mortu est.*

"*Jurat coram me* *James Ringold.*"

The plaintiff objected to the same being offered in evidence, because it did not appear that the will, if executed at all, was attested by the witnesses in the presence of the testator; and because it was not the original will, and did not appear to have been proved, so as to authorise the same to be recorded.

Chase, Ch. J. The court are of opinion, that the above circumstances are matters of fact to be determined by the jury; and that they may and ought, from the length of time which has elapsed since the making of the will, to presume that they were complied with. The plaintiff excepted.

On certain facts of title and descent, the jury were directed, that if they found them to be true, then land, which had been granted as escheat land, was not escheatable; although the land had not been claimed under the original grantee for upwards of 100 years.

In ejectment the plaintiff must recover on the strength of his own title; which recovery the defendant may prevent, by showing a title in himself, or a clear subsisting title in a stranger.

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land—he who hath the *jus possessionis*.

A clear subsisting title, outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties.

Land is not escheatable as long as there are heirs of the original grantee, and until the failure of his heirs, the land cannot be again granted; and if it is, it passes nothing.

An escheat grant is *prima facie* evidence of title.

Nothing but 20 years adversary possession can defeat a title acquired under a legal grant.

7. The plaintiff then offered in evidence an escheat warrant obtained by *Walter Tolly* on the 6th of September 1782, on *Holland's Park*; that *Tolly* died a few months after the date of that warrant, and that the defendant, who intermarried with the daughter of *Tolly*, obtained an escheat warrant on the 22d of August 1783, on the same

land, for want of heirs of *George Holland*, the grantee; that he returned a certificate of survey on the 1st of July 1784, and obtained a patent therefor, by the name also of *Holland's Park*, on the 13th of May 1785; and that the land, so granted to the defendant, is truly located by the plaintiff on the plots. The plaintiff then offered in evidence, that *John Larkin*, the devisee in the will of *George Holland*, died intestate in the month of February 1702, leaving *Thomas Larkin*, the other devisee in the said will, his heir at law, who married about the 2d of September 1697; and gave in evidence the will of *T Larkin*, dated the 10th of April 1731, in which *Holland's Park* is not mentioned; but there is a recital of a mortgage of sundry tracts of land executed by the testator to the heirs of *Amos Garrett*, more than sufficient to pay the debt for which they were mortgaged, and he desired that they might be sold, &c. He devised other lands to his daughter *Elizabeth*. That *T. Larkin* died in May 1731, leaving his daughter *Elizabeth*, the devisee in the will mentioned, his heir at law. He also offered in evidence the will of *E. Larkin*, dated the 25th of January 1735, in which no mention is made of *Holland's Park*, nor is there any residuary clause; and that she died unmarried, on the 4th of February 1735. He also offered in evidence the deed of mortgage referred to in the will of *T. Larkin*, in which mortgage *Holland's Park* is not mentioned. He also offered evidence that *Zachariah Maccubbin* intermarried with *Susanna*, his wife, on the 20th of July 1704, and died about the month of December 1756, leaving *Nicholas Maccubbin* his son and heir, and that *N. Maccubbin* died about the month of March 1787, aged about 85 years, leaving *Nicholas Carroll (a)*, of the city of *Annapolis*, his heir. He also gave in evidence, that *N. Maccubbin* was a sensible, intelligent man, possessed of a large fortune, and very careful and attentive to his interest. He further offered in evidence, that from the time of the grant to *Holland*, until the present time, no person has been known to have ever actually possessed or claimed *Holland's Park*, claiming it as such, except the lessor of the plaintiff, and the defendant, under their escheat grants aforesaid. And further, that no person of the name of *Larkin* or *Maccubbin*, or of any other name, has been known to set up a title to, or to claim

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(a) Name changed from *Maccubbin* by act of assembly.

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the said land, except under the escheat grants aforesaid. Also, that *Tolly* lived adjoining the said land during the whole of his life, and was an old man at the time of his death: and also that the defendant is an attorney of great legal information, and has been in the practice of the law for near or quite thirty years. The defendant then read in evidence the certificate and grant for *Holland's Park*, granted to *George Holland*; and gave in evidence that *Holland* afterwards died, having devised the land in fee to *John Larkin*; that *J. Larkin* died, and left issue two children, *Thomas*, his heir at law, and *Hester*; that *T. Larkin* afterwards died, leaving issue an only child, a daughter, named *Elizabeth*, which *Elizabeth* died without issue. That *Hester*, the sister of *T. Larkin*, and aunt to *Elizabeth*, intermarried with a certain *Nicholas Nicholson*, by whom she had issue *Susanna*, her only child and heir at law. That *Susanna*, after the death of *Hester*, intermarried with *Zachariah Maccubbin*, by whom she had issue *N. Maccubbin*, her eldest son and heir at law; that *N. Maccubbin*, after his mother's death, died, leaving issue a son named *N. Carroll*, his heir at law, now in full life, living in the city of *Annapolis*. He also offered evidence to prove that *Holland*, the patentee, *J. Larkin*, his devisee, and the before mentioned *T. Larkin*, *E. Larkin*, *H. Nicholson*, *S. Maccubbin*, *N. Maccubbin*, and *N. Carroll*, his son, have severally, at all times during their respective lives, lived and resided in *Anne-Arundel* county in this state; that the land called *Holland's Park* was originally located in *Baltimore* county, and that no person or persons ever built on, improved or cultivated the said land, or any part thereof, before the defendant in this cause in 1775, and the lessor of the plaintiff in 1795, except part thereof which had been occupied by a certain *James Gittings*, and that the residue of the land lay waste and unimproved. He further offered in evidence the original *debt books* of *Baltimore* county, and entries therein of the agents of the Proprietary, on one of which, viz. in 1769, is an entry in these words: "*Gideon Linthecum* Dr. To *Holland's Park*, 150 acres, 6s." and opposite thereto the following entry, viz. "Can't find any such person or land." And an entry on the *rent roll* in the land office, made about the year 1772, in these words, viz. "150. *Holland's Park*, surv'd. 14th October, 1683, for *George Holland*, above the head of *Gunpowder* river.

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Poss. 150. 6s. *Gideon Linthecomb.* The bounds of this land being lost, the land cannot be found; nor is there any such person in being as *Gideon Linthecomb.*" He also offered evidence to prove, that the tract of land in the said entries mentioned, was the same land which was surveyed for *Holland*, and patented to him by the grant herein before referred to; and that it is the land located by the defendant and the plaintiff on the plots, and that it is truly located by the defendant. He then prayed the direction of the court to the jury, that if the facts in the above statement are true, that then the legal title to *Holland's Park* is in *N. Carroll*, the heir at law of *N. Maccubbin*; that the land was not liable to escheat, and that the lessor of the plaintiff is not entitled to recover the said land, in the declaration mentioned, under his escheat grant in 1798.

Chase, Ch. J. The court are of opinion, and so direct the jury, that if they find the facts stated by the defendant to be true, that the legal title to *Holland's Park* is in *Nicholas Carroll*, the heir at law of *Nicholas Maccubbin*, and that the said land not being escheatable, the plaintiff is not entitled to recover the said land, in his declaration of ejectment mentioned, under the escheat grant to the lessor of the plaintiff in 1798.

In ejectment the plaintiff must recover on the strength of his own title. The defendant may prevent his recovery by showing a title in himself, or by showing a clear subsisting title in a stranger.

Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of the land, *i. e.* he who hath the *jus possessionis.*

A clear subsisting title outstanding in another, means such a title as the stranger could recover on in ejectment against either of the contending parties.

Land is not escheatable as long as there are heirs of the original tenant or grantee.

Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee; and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing, and cannot impair any right or interest acquired under his original grant.

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The escheat grant is *prima facie* evidence of title; but being only a presumption of right in the Proprietary, it can only exist until the contrary is proved; and if the jury find the facts stated by the defendant, there is evidence of a clear subsisting title in the heirs of *George Holland*, under the grant to him. *Holland's Park* having been legally granted to *George Holland*, nothing can defeat his title, and the title of his heirs, to the said land under his grant, but twenty years adversary possession.

The court are of opinion, that if the jury find the facts stated, a title has been legally deduced from *George Holland*, the patentee of *Holland's Park*, to *Nicholas Carroll*, and that the right to *Holland's Park* now subsists in him. The plaintiff excepted.

The jury were directed, that if they believed certain facts, than the presumption of law was, that Geo. H. for whom the land in dispute was surveyed on the 14th of October 1683, and granted to him on the 10th of August 1684, was seized thereof at the time of his will dated the 10th of February 1683, and his death in 1685.

8. The plaintiff also offered in evidence, an entry on the old *rent roll* in the land office, made about the year 1710, in these words, viz. "150 acres of *Holland's Park*, surv'd 14th October 1685, for *George Holland*, above the head of *Gunpowder* river, at a bounded tree at the end of a parcel of land called *Hill's Forest*, and now in possession of *John Ford* of *A. A.* county." Also an extract from the land office of the following tracts of land having been patented to *George Holland*, viz. *Collet's Neglect*, *Holland*, *Denton*, *Holland's Delight*, *Holland* and *Holland's Advent*. Also a record of a suit brought by *N. Maccubbin's* Lessee *vs. Medford*, about the year 1766, for establishing the bounds of a tract of land lying in *Kent* county, devised to *Maccubbin* by Col. *Richard Bennett*, and which suit was tried at the assizes held in *Queen-Anne's* county. The defendant then prayed the court to direct the jury, that if they believe the facts to be true as stated by him, that then the presumption of law is, that *George Holland* was seized of *Holland's Park* at the time of his will and death, and the same land passed to *Larkin*, his devisee, and no presumption from the facts stated on the part of the plaintiff can arise, that *Holland* was not seized of the said land at the time of his will and death.

The Court directed the jury accordingly. The plaintiff excepted.

Verdict, part for the plaintiff, and part for the defendant, and judgment thereon for the plaintiff. Both parties appealed to the late court of appeals, and at *November* term

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1805, the points arising on the *bills of exceptions*, (the *four* first taken on the part of the defendant, and the other *four* on the part of the plaintiff,) were argued in that court, on the cross appeals, by

Pinkney, *Key*, *Shaaff* and *Harper*, for *Hall*, and by

Martin, (Attorney-General,) for *Gittings's Lessee.*

The then Court of Appeals not having given judgment when the legislature passed the act of 1805, *ch.* 16, abolishing that court, these appeals were, by the act of the same session, *ch.* 65, transferred to the present Court of Appeals, and were argued at June term 1806, before TILGHMAN, BUCHANAN, NICHOLSON and GANTT, J. by

Harper and *Johnson*, for *Hall*, and by

Martin, for *Gittings's Lessee.*

On the part of *Hall*, it was contended by his counsel in the former and present arguments on the *first* bill of exceptions, 1. That the Lord Proprietary was entitled to the whole of the land in controversy, either by escheat or as vacant land, in case it was not included in *Tolly's Purchase.* 2. That the Proprietary was liable to the operation of the act of limitations, and of adversary possession. 3. That he was therefore out of possession, and had merely a right of entry when the act of confiscation divested him of his rights, and transferred them to the state. 4. That the state acquired merely a right of entry, and had not a complete title or right of possession without office found or actual entry. 5. That the want of office found, or actual entry, was not supplied by the act of confiscation, and consequently that the state's patentee had no right of entry, and could not maintain the possessory action of ejectment. 6. That as far as the Proprietary's right depended on the escheat, it was a right *in pais*, liable in its own nature to be defeated by adversary possession, or other matter *in pais*, and requiring an office found, or actual entry, to perfect it; that it was transferred to the state with all its original and inherent properties; and consequently was liable, even in the hands of the state, to be defeated by the adversary possession of *Tolly*, and those claiming under him. They referred to *Russell's Lessee vs. Baker*,

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1 *Harr. & Johns.* 71. *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 121. *Bro. Ab.* tit. *Prerogative*, s. 91. 2 *Hawk.* 448. *Bro.* 34. 4 *Coke*, 48, 58.

On the *second* bill of exceptions it was contended, 1. That if the escheat of *Holland's Park* had fallen at the time when *Tolly's Purchase* was granted, so much of the first tract as was included within the true location of the latter would pass by the grant of the latter. 2. And that if the escheat had not fallen, but fell afterwards, still the latter grant would operate as an *estoppel* on the Lord Proprietary, (who it was contended was bound by estoppels like other persons,) and would pass the land to the grantee of the latter tract by way of estoppel, and would defeat the title of the lessor of the plaintiff under his grant of *Friendship Compleated.* They cited *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 121. *Russell's Lessee vs. Baker*, 1 *Harr. & Johns.* 71. 3 *Blk. Com.* 308. 10 *Vin. Ab.* 454, 455, pl. 9, 10; 482, pl. 1; 484, pl. 15. *Co. Litt.* 45, a. 47, b. 352, a. *Litt. sect.* 58. 6 *Mod.* 258. *Hayne vs. Maltby*, 3 *T. R.* 441. 4*th Supp. to Vin. Ab.* 127. *Fairtitle vs. Gilbert*, 2 *T. R.* 171. 4 *Com. Dig.* 78, 81, 84. *The Attorney-General vs. Snowden*, 1 *Harr. & Johns.* 332. *Moale vs. Howard*, in the general court, (see *post.*) *Owings vs. Norwood's Lessee*, (*ante* 96.) *Hawkins vs. Hanson*, 1 *Harr. & M'Hen.* 528, (argument of counsel.)

On the *third* bill of exceptions it was contended, that the location of an escheat grant was to be made by its own expressions, and not by those in the original grant. They cited *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 193. 2 *Shep. Ab.* 279. 14 *Vin. Ab.* 78, pl. 8. 2 *Roll. Ab.* 50. *Bac. Ab.* tit. *Grants*, (H.) 3 *Blk. Com.* 379. *Co. Litt.* 42. 2 *Blk. Com.* 847, 379, 380. *Bac. El. ch.* 3. *Hob.* 71.

On the *sixth* bill of exceptions it was contended, 1. That the circumstances stated did amount to a presumption in law, that the will of *Holland* was legally executed. They cited *Hands vs. James*, 2 *Com. Rep.* 531. *Croft vs. Pawlet*, 2 *Stra.* 1109. 5 *Bac. Ab.* 508. 2. That the statute of frauds did not extend to this country until after the time when *Holland's* will was proved. They cited *Clayland's Lessee vs. Pearce*, 1 *Harr. & M'Hen.* 29. *Carroll's Lessee vs. Llewellin*, *Ibid* 162.

On the *seventh* and *eighth* bills of exceptions it was contended, that *Holland* was seized of *Holland's Park* at the

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time of his will and death; that the certificate of survey was four months before the date of the will, (the year then beginning the 25th of March, and October of course being before February;) and that the grant in 1684 would relate to the certificate of survey in 1683. They cited 18 *Vin. Ab.* 222. *Pigott on Com. Recov.* 26.

The counsel for *Gittings's Lessee*, on the *first* bill of exceptions, referred to the acts of October 1780, *ch.* 45, and *ch.* 49. 2 *Hawk.* 448, *ch.* 49, *s.* 1, 2. *Bro. Ab.* tit. *Prerogative*, 143, b. pl. 91. *Ibid* tit. *Devant*, 109, a. pl. 34. *Savil*, 7, (18th case). *Ibid* 70, (145th case). *Stanf. Pre.* 54, a. 2 *Roll. Ab.* 184, pl. 1, 2, 3, 4. 4 *Coke*, 58. *Taylor vs. Horde*, 1 *Burr.* 60.

On the *second* bill of exceptions he cited 10 *Vin. Ab.* 470, pl. 9; 482, pl. 1. *Co. Litt.* 47. b. 352. a. *Hath's Lessee vs. Polk*, 1 *Harr. & M'Hen.* 363.

On the *third* bill of exceptions he cited 2 *Shep. Ab.* 281. 14 *Vin. Ab.* 80, pl. 21; 83, pl. 41. 2 *Bac. Ab.* 661, 662. *Bac. El.* 86. 2 *Mod.* 3. *Bulst.* 177. 2 *Leon.* 235, *Trapp's* case. *Clayton*, 14, *Bradford's* case. 3 *Coke*, 9, *Dowties* case. *Brownl.* 42.

On the *sixth* bill of exceptions he cited *Collins vs. Nicols*, 1 *Harr. & Johns.* 399.

On the *seventh* and *eighth* bills of exceptions he contended, 1. That the escheat grant to the lessor of the plaintiff gave a presumptive right, and was *prima facie* evidence that the land was liable to escheat; that it was not shown by the defendant below that there was no such presumptive right, or that the land was not liable to escheat; that presumption was a rule of evidence, and not a fiction of law; that the evidence offered by the defendant ought not to have been admitted to defeat the right of the plaintiff, where for upwards of 100 years no person ever claimed the land under *Holland*, except the defendant, a wrong doer, who should not have the benefit of presumption in his favour. 2. That the facts stated, although they might be true, did not authorise the court to direct the jury to make the presumption, that *Holland* was seized of the land at the time of his will and death, no person ever having claimed or held under his will.

Curia adv. vult.

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The Court of Appeals, at the present term, *affirmed* the judgment of the General Court on both appeals, concurring in the opinions pronounced in the several bills of exceptions.

Tilghman, J. gave no opinion on the *third* bill of exceptions.

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Hammond, *et al.* Lessee, *vs.* Norris.

A deed located on the plots, and not contradicted by the opposite party may be read by the party locating it, to show how it is located, but when its validity comes in question if it is bad, it is to have no effect

The clerk of a court has no authority by law to certify a lost order book; his duty is to grant exemplifications

Parol evidence is not admitted to prove that a tract of land included in a certificate of survey, never was actually surveyed by the surveyor

Parol evidence admitted with the consent of the parties, to prove the law, practice and usages, of the land office, before the revolution

The efficient qualities of the different kinds of warrants used to take up vacant lands, set out

A person who has sent a warrant of resurvey, without having a title to the original tract resurveyed, acquires an equitable interest in the vacant land located, when the composition money is paid; and his grant thereof will relate to the date of the certificate of resurvey, if it appears that his certificate was returned to the land office previous to the time when a prior grant for the same land issued on a former certificate of survey, or else and compounded on after the composition money was paid upon his certificate and unless it was ascertained, the second grantee was a fair purchaser without notice of such equitable interest, and has legal estate cannot be overreached or defeated by relation

The court refused to direct the jury, that they were entitled from the evidence, that by the rules of the land office the certificate of resurvey, under which the plaintiff claims, was liable to be vacated upon a caveat, though the composition money was paid to them, if J H, for whom the same was made, had no estate in the original tract, and that upon the certificate being so vacated, the vacant land included therein, and also included by E D in his grant, were, if so appointed on in time, might legally be granted to C D, and being so granted, that the plaintiff has no title under his grant to any part of the land so included in the grant to E D

A deed for 86 acres of land, being part of a tract, without courses or distances, but referring to another deed, not produced, to ascertain the same, is a good evidence to show title, or to support the location thereof on the plat, without producing the deed to which it refers

Nor were certain facts and circumstances stated as a basis to prove the location of the 86 acres, or to show title thereto, or that the deed referred to, or some bond or contract for conveying the 86 acres by metes and bounds, was ever located on the plots, had ever been executed

Where the plaintiff has made but one location on the plots of the beginning of the land for which the grant is to issue, and that is counterlocated, the jury cannot find a beginning for the plaintiff different from that located by him

The plaintiff must make such locations of the land upon the plots as will suit his case

The jury cannot find a location of their own, but must find some one of the plaintiff's, if they find for him

If the beginning of a tract of land is lost or cannot be proved, then the beginning is to be found by reversing the lines of the tract from the first known and established boundary

Appeal from the General Court. The appellant brought an action of *ejectment* for a tract of land called *Part of Wood's Inclosure*, lying in *Frederick* county, containing 2286 acres. The defendant, (now appellee,) took defence on warrant under the general issue plea, and by his locations on the plots returned, defended himself under his title to a tract of land called *Usher's Freehold*, resurveyed for *Thomas Usher* on the 12th June 1785, and granted to the defendant on the 2d of September 1800. The cause was tried in the general court at May term 1803.

1. The plaintiff having located on the plots a deed from *John Howard* to *Philip Hammond*, offered to read in evidence that deed, bearing date the 27th of September 1753, being a deed of bargain and sale by way of mortgage, conveying unto *Hammond* "all those two parcels of land, being parts of a tract of land called *Wood's Inclosure*, and sold to the said *John Howard* by *Joseph Wood*, one parcel containing

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86 acres, the other 94 acres, *as by deed duly made, and recorded in the records of Frederick county, appears;* the said two parcels of land being also what the said *J. Howard's* dwelling plantation is made upon; also all that tract of land called *Chance*, lying in *Frederick* county," &c. To the reading of which deed the defendant's counsel objected, upon the ground that being a *mortgage*, the plaintiff must show how *Howard* became possessed of the land, or deduce his title; that although the deed is located on the plots, if it is a bad deed, it cannot be read in evidence to prove a location.

Chase, Ch. J.*(a)*. The court are of opinion, that if a paper or deed is located upon the plots, and not counter-located by the opposite party, the party, who so locates it, may read it to the jury, to show how it is located; but when the validity of the deed comes in question before the court, if it is bad, the court will direct the jury that it is a defective deed, and is to have no effect with them, but to be wholly disregarded.

The court think the objection by the defendant's counsel is not a valid one, and that the deed may be read in evidence of the plaintiff's location of it on the plots. The defendant excepted.

2. The plaintiff then read to the jury the deed from *J. Howard* to *P. Hammond*, with the permission of the court, (though objected to by the defendant,) as evidence that the deed was located upon the plots. It was admitted by the parties, that *Wood's Lot* and *Wood's Inclosure* are one and the same tract of land, and that there are two names for the same land. The defendant, to prove that *J. Howard* never had any interest or title in *Wood's Lot* or *Wood's Inclosure*, or in any part thereof, located upon the plots as beginning at *a*, offered to read in evidence the certificate of the clerk of *Frederick* county court, under his seal of office, certifying, "that among the records of the said county, from the commencement of the said county up to the year 1775, there is no deed, bond of conveyance, or other instrument of writing, from *Joseph Wood* to *John Howard*, for or respecting the land called *Wood's Lot*, or *Wood's Inclosure*, except a deed for ninety-four acres."

The clerk of a court has no authority by law to certify a fact under the seal of the court. His duty is to grant exemplifications

(a) *Done* and *Sprigg*, J. concurred.

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The plaintiff's counsel objected to the certificate by the clerk of *Frederick* county court being read in evidence, because, they contended, it was not the duty of the clerk to certify that there were *no deeds* remaining on record in his office; that his duty was to give exemplifications of such as might appear on record. That the clerk ought to have been *subpœned*, if the party wished the benefit of the evidence offered, and examined him as a witness, whether he had searched for, and could not find such deeds.

CHASE, Ch. J. The court are of opinion, that the certificate given by the clerk of *Frederick* county court is illegal and incompetent evidence, and refuse to let it be read to the jury.

The clerk has no authority by law to certify a fact under the seal of the court of which he is clerk. His duty is to grant exemplifications. The defendant excepted.

Parol evidence not admitted to prove that a tract of land included in a certificate of survey never was actually surveyed by the surveyor

3. The defendant then offered evidence, [*a witness to prove the confession of J. Howard,*] that the land called *Part of Wood's Inclosure*, included in the certificate thereof, made for *J. Howard*, and dated the 5th of March 1753 under which the plaintiff claims title, never was actually surveyed under the warrant whereon that certificate is alleged to be founded; that the certificate was not made by *Isaac Brooke*, the deputy surveyor of *Frederick* county, or by any other person duly authorised to make the same, but that the same was made by *J. Howard* himself, by references altogether, without any actual survey.

CHASE, Ch. J. The court refuse to let the defendant give the evidence offered, or any part thereof, to the jury, (a). The defendant excepted.

Parol evidence admitted, with the consent of the parties, to prove the law, practice, and usages of the land office

4. The plaintiff, to make title to the land in the declaration of ejectment mentioned, read in evidence the warrant of resurvey, dated the 5th of March 1753, and the certificate of survey thereon, dated the 5th of March 1753, and the patent for the land, dated the 20th of March 1753.

A common warrant may be located on any uncultivated vacant land in the county, if no person has acquired a right of pre-emption to such vacant land.

A special warrant is used to affect cultivated vacant land, in which the location and quantity of acres are designated and the party pays the composition money at the time of obtaining the warrant.

A warrant of resurvey is taken out for the purpose of resurveying a tract or parcel of land in which the party has a fee simple. The party thereby acquires a right of preemption in all the adjoining vacant land.

A person obtaining a warrant of resurvey, not having a title to the original tract resurveyed, acquires an equitable interest in the vacant land added, when the composition money is paid; and his grant therefor will relate to the date of the certificate of resurvey, if his certificate was returned to the land office when a prior grant for the same land was issued on a junior certificate of survey, not compounded on until after the composition money was paid on his certificate.

(a) See *Hammond et al. Lessee* vs. *Sheredine*, 4 *Harr. & M'Hen.* 420.

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rant of resurvey which issued to *John Howard*, on the 6th of February 1753, "to resurvey part of a tract of land called *Wood's Inclosure*, originally laid out for 86 acres, to amend all errors, and to add the contiguous vacancy," &c. Also the certificate of survey, dated the 5th of March 1753, made in pursuance of the warrant of resurvey, stating, that "by virtue of a special warrant of resurvey granted to *John Howard*, to resurvey part of a certain tract of land called *Wood's Inclosure*, originally laid out for 86 acres, bearing date the 6th of February 1753, to resurvey the said land, to amend all errors, and to add the contiguous vacancy," &c. The surveyor, *Isaac Brooke*, certified, that he had resurveyed the land, and found no error; that he had added a piece of contiguous vacancy containing 2200 acres, "beginning at the original beginning, and running thence with the original N 68° W 54 ps. N 19° W 60 ps. then S 8° W 81 ps. S 53° E 48 ps. S 52° W 98 ps. N 25° W 38 ps. N 23° W 80 ps. N 5° W 106 ps. N 36° E 95 ps. to intersect the beginning of the N 7° E 130 ps. course of a tract of land called *Howard's Range*, and running with said courses N," &c. &c. "containing 2286 acres of land." Also the assignment of *Howard* to *Philip Hammond*, on the 29th of November 1753, annexed to the certificate of survey, whereby *Howard* assigned to *Hammond* "the certificate returned on a certain resurvey had and made upon 86 acres of land, being part of a tract of land called *Wood's Inclosure*, originally taken up by *Joseph Wood*, together with all his (the said *Howard's*,) right, &c. of and in the said certificate and the land, which by resurvey contains 2286 acres," &c. Also that the certificate was *examined* and *passed* on the 6th of March 1754; the composition money paid on the 7th of March 1754, and the quit rents paid up to the 7th of June 1771, amounting to £80 5 0. Also other indorsements on the certificate, showing that it was on the 30th of January 1772, *caveated* by *Philip*, *Rezin*, and *Matthias Hammond*; on the 16th of March 1772, caveated by *Edward Dorsey*, of *John*; on the 29th of October 1772, caveated by *Thomas Dorsey*; that the caveats were dismissed by the act of April session 1782; that there was an entry in the margin of the book, in which the warrant was entered, that a caveat had been entered by *Greenbury Ridgely*, and others, in 1754, and which had not been noticed when the other caveats were entered dismissed, and a list thereof forwarded by the re-

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gister of the land office; that the last mentioned caveat of *Greenbury Ridgely* was withdrawn by *Richard Ridgely*, his son and heir at law, and that patent had issued on the 9th of September 1796 to *Philip*, *Rezin*, and *Charles Hammond*, and *Richard Hopkins*, and *Hannah* his wife. Also the last will and testament of *Philip Hammond*, (the elder,) dated the 6th of June 1753, wherein it does not appear that the land called *Part of Wood's Inclosure* is mentioned, but by his will "all the rest and residue of the real and personal estate" of the testator, is devised to his six sons, *Charles*, *John*, *Philip*, *Denton*, *Rezin* and *Matthias*, to be equally divided between them, and their heirs, as tenants in common. The plaintiff also offered in evidence, that *P. Hammond*, the testator, died some time in the year 1760, and that *Charles Hammond* was his eldest son and heir at law, to whom the title which *P. Hammond*, the father, had in the land, descended, and who became entitled to all the interest his father had therein *(a)*. The plaintiff then deduced a regular title from *C. Hammond*, down to the lessors of the plaintiff. Also that the tract of land for which this suit is brought, as well as the several tracts or parcels of land described in the grants and deeds aforesaid, are truly located by the plaintiff on the plots. The defendant then offered evidence to prove, that there was no tract of land in the county of *Frederick* patented by the name of *Wood's Inclosure*, or so called in the certificate for the same; that a tract of land situate in *Frederick* county, was on the 10th of January 1748-9, resurveyed for *Joseph Wood*, by virtue of a warrant of resurvey dated the 28th of July 1748, and patented to him, the 1st of June 1750, for 1540 acres, and called in the certificate and patent thereof, *Wood's Lot;* that this land did afterwards acquire, in the neighbourhood where it lay, the name also of *Wood's Inclosure*; that a tract of land contiguous thereto, surveyed on the 12th of November 1752, called *The Request*, and located upon the plots, did actually begin at the end of the 19th line of *Wood's Lot*, but in the certificate thereof, calls to begin at the end of the 19th line of *Wood's Inclosure*; that several mesne conveyances,

(a) The counsel for the plaintiff, in this part of the statement, which they had drawn up, stated, that *C. Hammond* had become "seized *prout lex postulat*." to which the counsel for the defendant objected. THE COURT said these expressions were only proper where a *legal* title descends—In this case an *equitable* title only descended to *C. Hammond*.

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for parts of *Wood's Lot*, executed by the proprietors thereof between the years 1754 and 1759, call and describe the land by the name of *Wood's Inclosure*. The defendant then read in evidence the patent to *Joseph Wood*, dated the 25th of March 1747, for the land called *Wood's Lot*, containing 126 acres, and granted to him for so much land due him by virtue of a warrant for that quantity granted him the 18th of February 1746, which tract is stated to lie in *Prince-George's* county, and beginning at a bounded oak standing on the E. side of a small branch, &c. agreeably to a certificate dated the 25th of March 1747. The defendant then offered evidence to prove, that *Wood's Lot* is truly located upon the plots, as beginning at A, and described by black lines from No. 1 to No. 43, black figures. Also that *J. Howard* never had any interest in, or title to, any part of *Wood's Lot*, or *Wood's Inclosure*, either in law or in equity, except as to 94 acres part thereof, which 94 acres are truly located on the plots; and to prove this, the defendant offered the evidence of the clerk of *Frederick* county court, the keeper of the land records of that county, to prove, that among the records of the county, from the commencement of the county up to the year 1775, there is no record of any deed, bond of conveyance, or other instrument of writing, from *Joseph Wood* to *J. Howard* for or respecting *Wood's Lot* or *Wood's Inclosure*, except the deed for the 94 acres above stated. Also the evidence of the clerk of the general court for the western shore, that among the records in his office there is no record of any deed, bond of conveyance, or instrument of writing of any kind, from *J. Wood* to *J. Howard*, respecting *Wood's Lot* or *Wood's Inclosure*, the plaintiff having on the trial produced no such deed, bond of conveyance, or instrument of writing, or any copy thereof. Also that *J. Howard*, or any person claiming from or under him, never was seized or possessed of any part or parcel of *Wood's Lot* or *Wood's Inclosure*, except the before mentioned 94 acres. Also that the 86 acres of land located by the plaintiff upon the plots, as the original upon which the resurvey called *Part of Wood's Inclosure* is pretended to have been made, was always, from the taking up thereof, to wit, from the 10th of January 1748, till the year 1780, in the possession, occupation, and actual user of *J. Wood*, the patentee, by actual inclosure of part, and by cutting and using

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the wood land as to the residue, and during all that time never was, in the whole, or in part, in the possession of *J. Howard*, or of any person claiming under him. Also, that from the 1st of January 1780, down to this time, the said lands have been, and still are, in the like possession and occupation of the defendant in this cause, claiming under *J. Wood*, and not under any title derived through or from *J. Howard*. The defendant then read in evidence a deed from *Joseph Wood* to *Edward Dorsey*, for part of *Wood's Lot* or *Wood's Inclosure*, dated the 20th of June 1754, and reciting, that on the 21st of June 1750, *Wood* had conveyed to *Dorsey* part of *Wood's Inclosure*, containing 584 acres; that the parties had discovered that patent had issued to *Wood* for the land, by the name of *Wood's Lot*, although commonly called and known by the name of *Wood's Inclosure*. This deed was therefore to confirm the title, &c. Which land is truly described on the plots as beginning at red B. and described by yellow lines. That on the 22d of August 1757, *E. Dorsey* obtained a *special warrant* to resurvey the part of *Wood's Lot* so conveyed to him, which warrant stated that he was seized in fee of and in 584 acres of land, part of *Wood's Lot*, lying in *Frederick* county, originally, on the 1st of June 1750, granted by patent of confirmation to *Joseph Wood* for 1540 acres, contiguous to which he had discovered some vacant land, and being desirous to add the same, prayed a special warrant to resurvey his part of the said tract—warrant was therefore granted to him, &c. Also a certificate made for *E. Dorsey*, bearing date the 18th of February 1758, in virtue of the said warrant, by which certificate it appears that the said part so resurveyed for *Dorsey*, contained only 564 acres; that 336 acres of vacant land were added, and called *The Resurvey on Part of Wood's Lot*, containing 900 acres. Also a patent to *E. Dorsey* for the same land, bearing date the 18th of February 1758. Also that *E. Dorsey*, the patentee, died previous to the 16th of October 1760, and that the lands descended to his heir at law *Thomas Dorsey*. Also that the land so granted to *E. Dorsey* is truly located on the plots beginning at B, and described on the plots by blue lines from 1 to 38, red figures, marked at the end of each line with red P W L. Also that *E. Dorsey*, the patentee, and those claiming under him, held, used and enjoyed, *The Resurvey on Part of*

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Wood's Lot, from the date of the certificate thereof, under the aforesaid title, down to the bringing of this ejectment, part of it in cultivation and under actual enclosure, and part being in woods uninclosed, by cutting, using wood on and therefrom; and that *J. Howard*, or any person under him, never did use, occupy, possess, or in any way enjoy, any part of the lands included in the resurvey called *The Resurvey on Part of Wood's Lot*, or any part of the lands included within the lines of the resurvey called *Part of Wood's Inclosure*. The parties in this cause, *by consent*, examined *John Callahan*, esquire, the register of the land office for the western shore, who deposed, that according to the law, practice, and usages of the land office, prior to the year 1753, and ever since, no person was entitled to a patent on a certificate returned on a warrant of resurvey, unless such person was seized of an estate of freehold in the original whereon the resurvey was made. That by the law, practice and usages aforesaid, from the time aforesaid, if the person so having returned a certificate, and had by the same included vacancy, and had paid to the officer, entitled to receive it, the full amount of caution money for the vacancy added, and the land was, after that payment, included in a subsequent certificate on which the caution money was fully paid, although subsequent to the payment of the first caution money, that in such case, if the prior certificate was caveated in the land office, and it was proved and made appear to the judges of the land office, that neither the person for whom the prior certificate was made, nor any one claiming the certificate, had any legal estate or seizin in the original on which the certificate of the resurvey was made, that then the prior certificate would be, and ought by the said law, practice and usages, to be vacated, and a patent ought to issue on the second or subsequent certificate, if that certificate was not in other respects liable to objection; and that upon so vacating the first certificate, the party claiming the same would be entitled to as much land warrant as would amount to the sum of money so paid for caution money. *Mr. Callahan*, upon cross examination, deposed that he has been in the land office, except fifteen or eighteen months, upwards of thirty-four years; that he came into that office in the year 1767. He knows of no proprietary instructions given, that a person taking out a warrant of

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resurvey on lands of which he was not seized in fee, and in virtue of that warrant including vacant land and compounding for the same, which prevented such person from having a patent for such vacant land. But that it was the understanding and practice of the office, in his time, that such patent would not be allowed. He knows of no usage or instance, in which a caveat has been heard and determined unless the caveator did show an interest in the lands at the time. He does not know any instance in which the caveat has prevailed unless the caveator had an interest in the land caveated. He knows of no instance in which a certificate made in pursuance of a warrant of resurvey, after composition money paid, by a person not seized of the original, has been caveated and vacated by a person not having an interest at the time when the money was paid, but has understood that any lands taken by a common warrant, special warrant or warrant of resurvey, would prevail against such certificate, but he cannot refer to any particular case. According to his understanding and recollection, the payment of the caution money was not made a question where the party obtaining the certificate had no original; but that where a certificate of junior date, regularly made and compounded on, including the same land, though made after the payment of the caution money upon the elder, prevailed. He has no recollection of any particular case, but he always understood the payment of composition money under such circumstances was an unimportant circumstance. He does not recollect any case where a person has entered a caveat alleging himself seized of the original, on which the warrant of resurvey issued to another person. *Interrogatories* were put to Mr. *Callahan* by the plaintiff and defendant, to which he answered in the manner set forth in *Kilty's Land Holders Assistant*, 456, 457 and 458.

The plaintiff then offered in evidence that the said *Callahan*, entered into the land office, as a clerk, in the year 1767, that at that time *William Steuart* was the chief clerk, and so continued till the year 1774, when *David Steuart* succeeded him and continued to hold that office until 1777; that *Saint George Peale* was appointed register of that office the 21st of April 1777, and so continued till the year 1779, when the said *Callahan* was appointed; and that during the time *William Steuart* was the chief clerk,

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Saint George Peale was principal acting clerk under him, and also under *David Steuart*, both of whom had several other clerks in that office. And the parties, by consent, also examined the Honourable *Alexander Contee Hanson*, chancellor of the state, and judge of the land office, who deposed and answered the several questions propounded by the counsel of the parties as they are set forth in *Kilty's Land Holder's Assistant*, 445 to 456, 460 to 465. Which evidence was delivered by the *register* of the land office for the *western* shore, and by the *Judge* of that office, in open court, and reduced to writing by them respectively; and the testimony by them so respectively given was, by consent of the parties, agreed to be received, to operate so far as the same is legal and proper. The plaintiff also read in evidence certain proprietary regulations or instructions. [*Which see in Kilty's Land Holder's Assistant.*] The defendant then offered to prove, that the certificate for *Part of Wood's Inclosure* had never been returned into the land office, until after *E. Dorsey* had obtained his patent for *The Resurvey on Part of Wood's Lot*, to wit, till after the 18th of February 1758; that *E. Dorsey*, and those claiming under him, have regularly paid the *quit rents* upon the whole of *The Resurvey on Part of Wood's Lot*, from the 18th of February 1758, to the commencement of the revolutionary war between the *United States* and *Great Britain*, and have ever since paid the public taxes and county levies and dues thereon. The plaintiff then prayed the opinion of the court, and their direction to the jury, that the patent which issued on the 9th of September 1796, to *Philip*, *Rezin*, and *Charles Hammond*, and *Richard Hopkins*, and *Hannah* his wife, will, by *relation* to the date of the certificate of survey, be effectual to pass a title to all the *vacant land* included therein, notwithstanding *John Howard* had no right or estate of, in and to, the *eighty-six* acres of land on which the warrant issued, and notwithstanding the same may have been included in *Edward Dorsey's* resurvey aforesaid.

Martin, (Attorney General,) *Key* and *Johnson*, for the plaintiff, cited 18 *Vin. Ab.* tit. *Relation*, 289, 290. *Garretson's Lessee vs. Cole*, 2 *Harr. & M'Hen.* 459. *Howard's Lessee vs. Cromwell*, 1 *Harr. & Johns.* 115. *Gibson's Lessee vs. Smith*, *Ibid.* 253. *Lloyd vs. Gordon*, 2 *Harr. & M'Hen.* 254.

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Shaaff, *Mason* and *Harper*, for the defendant, cited *Co. Litt.* 150. a. *Ringgold's Lessee vs Malott*, 1 *Harr. & Johns.* 299. 3 *Coke*, 28, 29, 30. *Anon.* 3 *Atk.* 314. *Townsend vs Ash*, *Ibid* 340. 2 *Shep. Ab.* (3d part.) 149, 150, 151, 152. *Bladen's Lessee vs Cockey*, 1 *Harr. & M'Hen.* 234. 3 *Lev.* 285. 2 *Vent.* 89, 200. *Cro. Jac.* 512. 10 *Coke*, 49. *Hath's Lessee vs Polk*, 1 *Harr. & M'Hen.* 363. 8 *Blk. Com.* 43. 2 *Roll. Rep.* 502. *Jenk.* 428. 18 *Vin. Ab.* tit. *Relation*, 290, pl. 8. *Selwin vs Selwin*, 2 *Burr.* 1134. S. C. 1 *W. Blk. Rep.* 222, 223. *Roe vs Griffits*, 4 *Burr.* 1962. *Doe vs Roe*, *Ibid* 1971. 2 *Roll. Ab.* 399. *Garretson vs Cole*, 1 *Harr. & Johns.* 370. *Beall's Lessee vs Beall*, *Ibid* 347. *Peter's Lessee vs Mains*, 4 *Harr. & M'Hen.* 423. *Chency vs Ringgold's Lessee*, (*ante* 87.) *West's Lessee vs Hughes*, 1 *Harr. & Johns.* 13. *Lloyd vs Tilghman*, 1 *Harr. & M'Hen.* 85.

Chase, Ch. J. In deciding the question before the court, it will be necessary to consider the efficient qualities of the different kinds of warrants which are used to take up vacant land, cultivated or uncultivated.

A *common warrant* may be located on any uncultivated land in the county, to the surveyor of which the warrant is directed, if no person has acquired a right of pre-emption to such vacant land.

A *special warrant* is used to affect cultivated land, in which the location and the quantity of acres are designated, and the party pays the composition money at or before the time of granting the warrant, for the number of acres so directed. The survey is then made within the usual time of *six months*, for ascertaining with more exactitude and precision the land thus affected. If on the survey being made it appears to the party that he has not as much land as he paid for, he can apply the surplus of his warrant to affect any vacant land, which a common warrant is competent to take, whether it lies in contiguity or detached from the land so located in his warrant.

A *warrant of resurvey* is taken out for the purpose of resurveying a tract or parcel of land in which the party has a fee simple. In virtue of such warrant, the party acquires a right of pre-emption in all the adjoining vacancy, and if he makes his survey, and pays the caution money within *two* years from the date of his warrant, he has a complete equitable interest in all the vacancy included in his survey.

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The question for decision now occurs, can a person, who takes out a warrant of resurvey without having a title to the land to be resurveyed, acquire a title in the vacant land taken up and included in such resurvey?

The court are of opinion, that such warrant will operate as a common warrant, and affect any vacant land which a common warrant was competent to affect; and that, if the jury find the facts as stated, that an equitable interest vested in *John Howard* on the 7th of March 1754, when the composition money was paid, in all the vacancy included in his resurvey, and that the patent obtained in 1796, and granted to *Charles*, *Philip*, and *Rezin Hammond*, and *Hannah Hopkins*, wife of *Richard Hopkins*, will operate by relation to the date of the certificate of resurvey, if it appears to the jury that the certificate was returned to the land office previous to the time when *Edward Dorsey* obtained his grant, which is stated to be on the 18th of February 1758. That, in the opinion of the court, unless that fact is found by the jury, *Edward Dorsey* was a fair purchaser without notice of the equitable interest of *John Howard*, and the grant of *Edward Dorsey* cannot be over-reached or defeated by relation. The defendant excepted.

5. The defendant then prayed the court for their opinion and direction to the jury, that if they were satisfied from the evidence, that by the rules and regulations of the land office in the year 1753, and since, the certificate of resurvey, under which the plaintiff now claims, was liable and subject to be vacated upon a caveat, notwithstanding the payment of the composition money thereon, if *J. Howard*, for whom the same was made, had no estate or seisin in the original tract, so resurveyed, and that upon the certificate being so vacated, *the vacant land* so included therein, and also included by *E. Dorsey* in his certificate of resurvey called *The Resurvey on Part of Wood's Lot*, as above stated, if the last certificate was compounded on in time, and in all other respects conformed to the rules and regulations of the land office, might legally, properly and regularly, be granted to *E. Dorsey*, and being so granted, that the plaintiff had no title under the grant for *Part of Wood's Inclosure* to any part of the land so included within the patent to *E. Dorsey* for *The Resurvey on Part of Wood's Lot.*

The court refused to direct the jury, that if they were satisfied from the evidence that, by the rules of the land office, the certificate of resurvey, under which the plaintiff claims, was liable to be vacated upon a caveat, tho' the composition money was paid thereon, if J. H. for whom the same was made, had no estate or seisin in the original tract, and that upon the certificate being so vacated, the vacant land included therein, and also included by E. D. in his junior certificate, if compounded on in time, might legally be granted to E. D and being so granted, that the plaintiff had no title under his grant to any part of the land so included in the grant to E. D.

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CHASE, Ch. J. The court cannot give the opinion and direction prayed for. The defendant excepted.

A deed for 86 acres, being part of a tract of land, without courses or distances, but referring to another deed, which cannot be found, to identify the same, is not legal evidence to show title or to support the location thereof on the plots. Nor were certain facts and circumstances admissible to prove the location of the corners, or to show title thereto.

6. The plaintiff then gave in evidence the patent of *Wood's Lot*, granted to *Joseph Wood* on the 25th of March 1747, for 126 acres of land. Also a resurvey made thereon by *Wood*, and the patent granted to him on the 1st of June 1750, for 1540 acres of land, and called *Wood's Lot*; and that the same lands are truly located on the plots. Also, that the resurvey called *Wood's Lot*, was known in the neighbourhood by the name of *Wood's Inclosure*, and that *Wood's Lot*, the resurvey, and *Wood's Inclosure*, were one and the same tract of land. Also a certificate of resurvey made by *J. Howard* of *Part of Wood's Inclosure*, surveyed on the 5th of March 1753. He then deduced the title to the said land down to the lessors of the plaintiff. He then offered in evidence the deed dated the 21st of June 1750, from *J. Wood* to *J. Howard*, for 94 acres of land, being part of *Wood's Lot*, and called *Wood's Inclosure*; and that the same is truly located by him on the plots. Also a deed from *J. Wood* to *E. Dorsey* for a part of *Wood's Lot*, dated the 20th of June 1754; and that the same is truly located by him on the plots. He then produced, and offered to read in evidence, the deed from *J. Howard* to *P. Hammond*, dated the 27th of September 1753, herein before mentioned in the *first* bill of exceptions; and showed, that the 86 *acres* of land therein mentioned, were located by him on the plots, beginning at the end of the 27th line of *Wood's Lot*, as located by him at black *a*, and running, &c. to the beginning; and to prove that to be the true location thereof, he offered to give in evidence the deed, and the resurvey made by *E. Dorsey* on the 18th of February 1758, on the land so conveyed by *J. Wood* to *Dorsey*, and called *The Resurvey on Part of Wood's Lot*; and that the resurvey is truly located by him on the plots; and that the 55th line of that resurvey strikes the end of the third line of the 86 acres, and then runs three lines thereof reversed to the beginning of the 86 acres, and thence to its beginning at black *B*, excluding the 86 acres. He further offered to prove, that after the death of *E. Dorsey*, the land contained in the last mentioned resurvey and patent descended to *T. Dorsey* his heir. Also that the devisees of *P. Ham-*

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mond, the assignee, claimed the land contained in the certificate, so assigned, as personal property, and that *C. Hammond*, his heir, claimed the same as land not devised by the will. Also, that a caveat was entered by the devisees against the issuing of a patent to *C. Hammond* on the certificate, and which caveat was endorsed and noted on the certificate on the 30th of January 1772. He also offered in evidence, a deed dated the 17th of November 1779, from *Philip* and *Rezin*, two of the devisees, to *Matthias Hammond*, one other of the devisees, for their interest in the two tracts mentioned in the deed from *J. Howard* to *P. Hammond*, their father, and in which the 86 acres are described by the following metes and bounds, to wit: "Beginning at the end of the 27th course of the land called *Wood's Inclosure*, and running" &c. and that the same are the beginning, courses, metes and bounds, by which the plaintiff hath located the 86 acres on the plots. Also a deed dated the 17th of November 1779 from *M. Hammond* to *B. Warfield*, conveying all his right and interest to the two parcels of land mentioned in the deed from *J. Howard* to *P. Hammond* to be conveyed, and in that deed the 86 acres of land are described as contained within the same metes and bounds and beginning at the same place. And that *Warfield* did, in consequence of that deed, enter upon and possess the parcels of land therein mentioned, and that afterwards, in the year 1790, he sold his interest and right in the two parcels of land to *T. Dorsey*, and gave up the two parcels of land to *T. Dorsey*. Also an original deed, dated the 14th of March 1772, from *C. Hammond*, heir at law of *P. Hammond*, to his brother *J. Hammond*, one of the devisees, for his interest and estate in the two parcels of land. And that *J. Hammond*, in his life-time, sold all his interest in the two parcels of land to *T. Dorsey*; that both *C.* & *J. Hammond* departed this life antecedent to the 22d of June 1784, and that *W. Hammond* was the son and heir of *J. Hammond*; and that on the 22d of June 1784, *W. Hammond*, in consideration of the payment to him by *T. Dorsey* of the sum of £23 7 6, the balance of the purchase money then due from *T. Dorsey*, under the sale by his father, did execute a deed to *T. Dorsey*, conveying to him all his right and interest in the two parcels of land. And that *T. Dorsey*, so being entitled, as heir

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at law, to the lands contained in the resurvey made by *E. Dorsey*, and having so purchased the two parcels of land mentioned in the deed from *J. Howard* to the first mentioned *P. Hammond*, afterwards, on the 27th of September 1784, entered into a contract in writing, under seal, with *Thomas Usher*, for the sale of certain lands, and among others, the 86 acres, and that the 86 acres in that contract are described as being purchased by *P. Hammond*, in his life-time, on the 9th of November 1751, of a certain *J. Howard*, and as having been bought by *T. Dorsey* of the devisees of *P. Hammond*, and as having been sold by *J. Howard* to *P. Hammond*, and purchased by *T. Dorsey*; and having proved the execution of the contract, offered to read the same in evidence. He also offered to give in evidence a deed from *T. Dorsey* to *T. Usher*, dated the 12th of February 1785, for the several tracts of lands in the contract mentioned; and that the courses, lines and metes, mentioned in the deed, are truly located on the plots by the plaintiff, and do include the whole of the 86 acres as located by the plaintiff, and that one line thereof strikes the second line of the 86 acres, as located by the plaintiff, and runs thence to the end thereof, then with the 3d, 4th, 5th, and 6th lines of the plaintiffs' location of the 86 acres, and then with the given line, o its beginning at black *a*, and thence to black *B*, the beginning of the deed; and that in the deed there was a covenant of warranty as to the parts of the resurvey on *Wood's Lot* contained in the said deed, against *T. Dorsey*, his heirs and assigns, and against *J. Howard*, and his heirs and assigns only. Also a deed from *T. Dorsey* to *T. Usher*, dated the 27th of May 1785, for the same lands, describing them in the same manner, but containing a general warranty. And that *T. Usher* did, by virtue of the deeds to him, enter into and take possession of the lands so conveyed by *T. Dorsey*, and among other parts thereof, of the 86 acres, so sold to him by *T. Dorsey*, and so located, and made a resurvey thereon, and returned a certificate of resurvey, dated the 12th of June 1785, called *Usher's Freehold*, and that the same is truly located on the plots by the plaintiff; and that the lines thereof include the whole of the 86 acres, striking the same at the same place, and running with it in the same manner as the deed from *T. Dorsey* to *T. Usher*, and that *T. Usher* was possessed of the land

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so contained in his certificate, until his death, which happened about January 1786. That *T. Usher*, by his will appointed *T U*, *S J*, *J U*, & *J D*, executors thereof, and did devise, direct, and empower them, or the survivors or survivor of them, to make sale of all and every part of his real estate, and to execute deeds for the same, to the purchasers thereof, in fee simple; and that the executors did take upon themselves the execution of the will, and obtained, in due form of law, letters testamentary. That after the death of *T. Usher*, one *John Salmon* filed a bill in the court of chancery against the devisees and executors of *T. Usher*, to compel a sale of his real estate for the payment of his debts; that it was so proceeded in that suit, that a decree was made for the sale thereof; and that by virtue of that decree, the said lands were sold to divers persons, as stated in a report thereof returned to the court of chancery, and by the chancellor approved, ratified and confirmed. That the part of the land located by the defendant as his defence, was purchased by *Catharine Usher*, widow of *T. Usher*, and by her sold to the defendant, who entered into and possessed the same under that sale. That it was agreed that the patent upon the certificate so returned by *T. Usher* should, for convenience, be granted to the defendant, and that he should then convey to the several purchasers under the decree, the respective parts respectively by them purchased; that the patent was so issued, and conveyances so made, and that the respective purchasers of the land, so contained in the certificate returned by *T. Usher*, did enter upon and possess the parts thereof by them respectively purchased, by virtue of the title of *T. Usher*, and the sales under the decree. And that after the death of *T. Usher*, his executors claimed the whole land contained in the certificate, so by him returned, under his title. Also a deed from *Joseph Wood*, the patentee, to *Jonathan Wood*, his son, but not his heir at law, dated the 4th of March 1780, for "all that tract or parcel of land, being part of a tract called *The Resurvey on Wood's Lot*, beginning at the end of the 27th line of the said resurvey on *Wood's Lot*, and running," &c. "containing 153 acres of land," &c. And that the 153 acres included the 86 acres of land mentioned in the deed from *J. Howard* to *P. Hammond*, and are the same 86 acres of land located by the plaintiff as the 86 acres sold to *T.*

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Usher by *T. Dorsey*. Also a deed, dated 9th May 1786, by *Jonathan Wood*, executed in due form of law, to the executors of *T. Usher*, to confirm their title to the 86 acres, in which it is expressed, "that doubts had arisen in regard to the title of 86 acres, part of a tract of land sold by *T. Dorsey* to the said *T. Usher*," and that in consequence *Jonathan Wood* conveyed to the executors of *T. Usher*, all his right and title to the 86 acres, to begin at the end of the 27th course of *Wood's Inclosure*, and running thence, &c. That the courses and beginning, so described by the heir of *Joseph Wood*, under whom *J. Howard* claimed the 86 acres, are exactly correspondent with the location of the 86 acres made on the plots by the plaintiff. That before and at the time when the said deed was executed, the executors were possessed of the 86 acres, according to the location under the title of *T. Usher*, and that the 86 acres were the same 86 acres mentioned in the deed from *J. Howard* to *P. Hammond*, and which had thus been conveyed to *P. Hammond*, and which had thus been conveyed to *Warfield*, and to *T. Dorsey*, and on which *J. Howard* made his resurvey; and that no person whatever has had any possession of the 86 acres, located as the plaintiff hath located the same, except *J. Howard*, and those claiming from and under him. Evidence was then offered, that no deed could be found on record from *Joseph Wood* to *J. Howard* for the 86 acres.

Mason, *Shaaff*, and *Harper*, for the defendant, objected to the reading of the deed from *J. Howard* to *P. Hammond*, dated the 27th of September 1753, to prove the location of the 86 acres. They cited *Co. Litt.* 352. *b.* 3 *Com. Dig.* (E. 4.) 274.

Martin, (Attorney General,) *Key* and *Johnson*, contra, cited *Gitting's Lessee vs Hall*, 1 *Harr. & Johns.* 14. *The Earl of Sussex vs Temple et al.* 1 *Ld. Raym.* 311; and *Gilb. L. E.* 100.

Chase, Ch. J. The deed from *J. Howard* to *P. Hammond* of the 27th of September 1753, does not sufficiently specify the land, being for 86 acres, and 94 acres, parts of *Wood's Inclosure*, "conveyed by *Joseph Wood* to *John Howard*, as appears by deed recorded in *Frederick* county," but the deed thus referred to cannot be found. This

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deed does not define the 86 acres by any courses or distances, there is, therefore, nothing in it whereby any locatable land can be conveyed, and of course passes nothing, and passing nothing it cannot be evidence. Nothing but the deed itself can prove the location of the land recited in the deed now offered to be read to the jury. The court are therefore of opinion, that the deed from *J. Howard* to *P. Hammond* is not legal evidence to show title in *Hammond* in the 86 acres of land, part of *Wood's Inclosure*, as located on the plots by the plaintiff, or to support his location of the same, without producing the deed from *Joseph Wood* to *J. Howard*, to which the deed from *J. Howard* to *Hammond* doth refer, to ascertain and identify the 86 acres intended to pass by the same; and that the deed is inoperative to pass the same, without producing that deed. The court refuse therefore to suffer the same to be read to the jury.

The court are also of opinion, that the facts and circumstances, stated by the plaintiff, are inadmissible to prove the location of the 86 acres, and the court refuse to suffer the same to be read to the jury for that purpose, or to show title in *P. Hammond* in the 86 acres of land. The plaintiff excepted.

Nor that the deed referred to, or some bond or contract for conveying the 86 acres by the metes and bounds, &c. as located on the plots, had ever been executed

7. The plaintiff then, in order further to prove that *J. Wood* did execute to *J. Howard* some conveyance for the 86 acres of land, or some bond or contract for the conveying to *Howard* the 86 acres, by the same metes and bounds, and beginning as located by the plaintiff, offered to give in evidence the deed from *Howard* to *P. Hammond*, and the resurvey made by *E. Dorsey* on the 18th of February 1758, on the land so conveyed by *Wood* to *Dorsey*, and that the resurvey is truly located, &c.

Chase, Ch. J. delivered the same opinion as that given on the prayer in the preceding bill of exceptions, and then proceeded as follows; The court are also of opinion, that the facts and circumstances, stated by the plaintiff, are inadmissible to prove, that *Joseph Wood* did execute to *John Howard* a conveyance for the 86 acres of land, or a bond, or contract, for the conveying to *Howard* the 86 acres by the same metes and bounds, and beginning as located by the plaintiff; and do accordingly refuse to allow

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the same to be given in evidence to the jury. The plaintiff excepted.

Where the plaintiff has made but one location on the plots of the beginning of the land for which the ejectment is brought, and that is counterlocated, the jury cannot find a beginning for the plaintiff different from that located by him.

The plaintiff must make such locations on the plots as will suit his case.

The jury cannot find a location of their own, but must find some one of the plaintiff's, if they find for him.

8. The plaintiff then prayed the opinion and direction of the court to the jury, that unless they are satisfied, from the evidence, of the true position of the beginning of the 86 acres of land, on which the resurvey called *Part of Wood's Inclosure* was made, or the beginning of that resurvey, and for which land this suit is brought, that then they *have a right, and are bound* by law, to ascertain a place of beginning, by reversing the first nine courses of that resurvey without variation, or with such variation as they think right, from the place marked *a* on the plots, at red figures 27, and red *P W L*, and that unless they are satisfied, from the evidence, of the place where the 104th line of the resurvey calls for, that then the true location of the land is to be ascertained by running the lines of the resurvey from the place marked on the plots at *q*, without or with such variation as they think proper, until the given line shall intersect and close with the beginning so found by reversing as aforesaid. And that the jury are by law competent to draw lines on the plots, to ascertain the true position of the land in the declaration mentioned, or to make such description thereof in their verdict, as shall fix the true position of the same, notwithstanding there are no such lines on the plots at this time located. And in case they have evidence, to satisfy their minds, of the true original beginning of the resurvey made by *Wood*, and for which this suit is brought, and that the same is at a place different from what is located by either the plaintiff or the defendant, that then they are to begin at the place so proved, and run the first eight courses of the grant, without or with such variation as they think most proper, to correspond with the original location; and that the ninth course must be run to its call at *a*, red 27, red *P W L*; and in case they have not evidence to establish the place called for at the termination of the 104th line, that then they have a right, and are bound, to locate the lines from *q*, with or without variation, as they think proper, until the given line shall intersect and close with the place of beginning. And that the jury are by law competent to draw lines on the plots to ascertain the true position of the land, or to make such description thereof in their verdict

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as shall fix the true position of the land, notwithstanding there are no such lines on the plots at this time located. And on fixing such location the plaintiff is entitled to their verdict for all such land as is included within their finding, and which is also contained in the locations of the plaintiff of *Part of Wood's Inclosure*, and for which the defendant hath taken defence.

Martin, (Attorney General,) and *Key*, for the plaintiff, cited the act of *November* 1781, *ch.* 20, *s* 14, and *Carroll, et al. Lessee vs E. & S. Norwood*, 1 *Harr. & Johns.* 167.

Shaaff, for the defendant, cited *Kirkpatrick's Lessee vs Kyger*, 1 *Harr. & Johns.* 298, and *Webb's Lessee vs Beard*, *Ibid* 349.

Chase, Ch. J. The court cannot give the direction prayed on the part of the plaintiff, inasmuch as the plaintiff has not made any location on the plots to warrant the court in directing the jury to find a beginning for the plaintiff, different from that located at the letter *G*, as the beginning of *Part of Wood's Inclosure*, the plaintiff having made only one *location* of the *beginning* of that tract of land, and the same having been counterlocated by the defendant.

The chief judge said, that the plaintiff must make such locations as will suit his case. He has made two from the same beginning, one of which the jury must find, if they find for the plaintiff. It is customary, in order to meet the variation of the compass, to make sundry locations, so as to have one which the jury may find. The plaintiff relies upon his locations; and the jury cannot find a location of their own, but must find some one of the locations made by the plaintiff, if they find for the plaintiff. The plaintiff excepted.

On motion of the plaintiff's counsel, leave was given by the court to withdraw a juror, for the purpose of amending the plots; but the plots were amended by consent of the parties without withdrawing a juror, and the trial continued.

9. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if the beginning of *J. Howard's* resurvey is lost, or cannot be proved, then the beginning of the same is to be found by reversing the lines from the first known and established boundary; and

If the beginning of a tract of land is lost, or cannot be proved, then it is to be found by reversing the lines from the first known and established boundary.

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that the holders under that resurvey are entitled to all the land within that resurvey located from such beginning so found, unless taken away by elder surveys.

The Court gave the direction to the jury as prayed.

Verdict and judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued at the last term before Tilghman, Nicholson, and Gantt, J. upon the bills of exceptions taken by the plaintiff in the court below, being the 6th, 7th and 8th, as herein before stated and numbered.

Key, and *Johnson* (Attorney General,) for the Appellant, in their arguments stated, that under the *sixth* and *seventh* bills of exceptions two questions occurred—1. Whether *Howard* had title to the 86 acres of land upon which his resurvey was made? And 2. Whether sufficient evidence was offered to the jury to establish the location of the 86 acres on the plots? They contended that there was sufficient evidence for the court to direct the jury to presume a deed from *Wood* to *Howard*. At all events that the evidence ought to have been suffered to go to the jury for them to judge whether or not such a deed had ever been executed. They cited *Gilb. L. E.* 98. *Gitling's Lessee vs. Hall*, 1 *Harr. & Johns.* 14.

On the *eighth* bill of exceptions they contended, that the jury had a right to draw lines on the plots, or in any other manner they might think proper, in order to find the beginning of the land in controversy, although the beginning so found might be at a different place from that located on the plots by either of the parties. They cited *Darnall's Lessee vs. Goodwin*, 1 *Harr. & Johns.* 282. *Carroll et al. Lessee vs. Norwood, Ibid* 186.

Shaaff and *Harper*, for the Appellee, in their arguments on the *sixth* and *seventh* bills of exceptions, cited *Vaugh.* 74. *Gilb. L. E.* 99. *Morris's Lessee vs. Vanderen*, 1 *Dall. Rep.* 67. *Com. Dig.* tit. *Evidence*, (B 5.) *Smith vs. The Vestry*, &c. in this court on the E. S.

On the *eighth* bill of exceptions they insisted that the plaintiff could not give evidence that the beginning of the land, for which he brought his ejectment, was at a different place than that claimed by his locations on the plots.

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They cited *Kirkpatrick's Lessee vs. Kyger*, 1 *Harr. & Johns.* 289. *Webb's Lessee vs. Beard*, *Ibid* 349. *Hughes's Lessee vs. Howard*, decided in *Baltimore* county court, and now on appeal in this court.

Curia adv. vult.

THE COURT, at this term, decided that there was no error in the opinions given by the general court in either of the bills of exceptions taken on the part of the plaintiff below.

NICHOLSON, J. concurred, except as to the opinion given in the *eighth* bill of exceptions, and from that opinion he dissented,

JUDGMENT AFFIRMED.

HAMMOND, *et al.* Lessee, *vs* WARFIELD.

DECEMBER.

The courts will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules.

The rules of the land office cannot be proved by witnesses; they are to be found on the records of that office, and in the proclamations of the proprietary

The usage and practice of the land office must be proved by the adjudications of the judges of that office, and not by the opinions of witnesses as to what was that usage and practice

Where a warrant of resurvey, taken out by J H, who was not seized of the original tract resurveyed, was located on vacant land not contiguous to such original tract, his grant therefor will operate by relation to the date of the certificate of resurvey, if the composition money was paid in time, and the certificate of resurvey was returned to and in the land office, when a warrant of resurvey issued to J C to affect the vacant land included in J H's certificate; or if the composition money was not paid in time by J C on his resurvey, and J H's certificate was in the office when J C did compound, the grant to J H will relate to the date of the certificate.

But if J H's certificate was not in the office when the warrant issued to J C, and J C compounded on his resurvey in time; or if J H's certificate was not in the office when J C did compound, though not in time, and obtained his grant, then J C was a fair purchaser for a valuable consideration without notice of the equitable interest of J H, and the grant to J C cannot be overreached by relation.

If vacant land, not contiguous to the original tract resurveyed, is included in the certificate of resurvey, it is not legal notice of the location of the warrant, until the certificate is returned to the land office.

If an assigned land warrant was applied in time to the payment of composition money on vacant land included in a certificate of resurvey, such application will be equivalent to the payment of so much money

The jury are to find when the composition money was paid on a certificate of survey.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures.

Where the plaintiff's grant operated by relation to the date of the certificate, and overreached the defendant's elder grant for the same land, the entry of the grantee, under such elder grant, and the possession by him, and those claiming under him, was without right, and cannot bar the plaintiff's recovery, unless such possession was by actual enclosures for 20 years prior to the bringing the ejectment

To entitle a party to the benefit of the relation of his grant to the certificate, it is incumbent on him to shew an equity; and the producing copies under seal of the warrant, certificate and grant, is not sufficient to entitle him to such benefit.

The time when a certificate was returned to the land office, is a matter of fact determinable by the jury.

A petition to the judges of the land office by T D, with certain alterations made therein in the handwriting of a clerk in that office, (now dead,) stating when a certificate was returned, not permitted to be given in evidence, as a circumstance to prove at what time the certificate was returned, or to prove it was returned before a certain period, as the party against whom the testimony is intended to operate does not derive any interest in the land in question under T D.

Appeal from the General Court. Ejectment for a tract of land called *Part of Wood's Inclosure*, lying in *Frederick* county, containing 2286 acres. The defendant, (now appellee,) took defence on warrant, under the general issue plea, for a tract of land called *The Resurvey on Hobson's Choice.*

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1. At the trial at May term 1803, the defendant produced the honourable *Alexander Contee Hanson*, chancellor, and judge of the land office for the western shore, and proposed to him the following question, to wit: "If a certificate on a warrant of resurvey is returned, in which vacant land is included, not contiguous to the original, but separated by elder surveys, and the person returning the said certificate has paid the caution for the land not contiguous to the original, and no patent has issued, and a man by a warrant taken out after the payment of the said caution money, returns a certificate including the vacancy comprehended in the certificate of the survey which is not contiguous to the original, and pays the caution money; if the above facts appear to the judges of the land office, would not, by the laws of the land office, the former certificate be vacated as to the vacancy not contiguous, and patent issue to the younger certificate?" But the counsel for the plaintiff objected to the question put to the witness.

CHASE, Ch. J. The courts of justice will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules. The rules of the land office cannot be proved by witnesses; they are to be found on the records of the land office, and in the proclamations of the proprietary. Opinions as to the rules of the land office cannot be received as evidence. The usage and practice of the land office must be proved by the adjudications of the judges of the land office, and not by the opinions of witnesses as to what that usage and practice may be. The adjudications contain the legal information as to what have been the usage and practice in the land office. The court therefore refuse to allow the witness to be examined. The defendant excepted.

When a grant shall by relation operate from the date of the certificate of resurvey, and when it shall not, where the vacant land included, was not contiguous, and the person obtaining the warrant was not seated on the original tract resurveyed.

An assigned land warrant may be applied to the payment of the composition money on vacant land surveyed

2. The plaintiff offered in evidence the same title which was offered in evidence in the case of the same plaintiff against *John Norris*, tried at the present term, and which title is particularly set out in the *fourth bill of exceptions* taken in that cause. *(Ante* 132.) The plaintiff then proved, that the land referred to, called *Wood's Lot*, acquired by reputation the name of *Wood's Inclosure*, and that they are one and the same tract of land. The defen-

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dant then read in evidence a patent granted to *John Carmack*, *Stephen Richards*, and *Daniel Richards*, for a tract of land called *Hobson's Choice*, dated the 23d of January 1753, for 25 acres. Also a warrant of resurvey granted to the said patentees on the 18th of April 1753. Also a certificate made in virtue of that warrant, dated the 4th of September 1753, and the land called *The Resurvey on Hobson's Choice*, containing 395 acres, which was examined and passed the 1st of July 1755. Also the patent which issued in virtue of that certificate, to *Basil Dorsey*, dated the 19th of May 1755, stating that the certificate had been, on the 19th of May 1755, assigned to him by *Carmack* and *Richards*. Also an order of the land office for granting a certain warrant, and the warrant which issued in virtue thereof, dated the 15th of October 1754, to *Henrietta Maria Dulany*, for 3000 acres. Also a renewment of that warrant on the 7th of April 1755, to *H. M. Dulany*, for 1127 acres. Also the marginal entries on the warrant, showing how the same had been employed, viz. "370 acres assigned *Basil Dorsey*, and applied to *The Resurvey on Hobson's Choice.*" Also an assignment from *H. M. Dulany* to *B. Dorsey*, for 370 acres, a part of the said warrant. He also offered evidence to prove that the certificate of *Part of Wood's Inclosure*, was not returned to the land office at any time on or before the 19th of May 1755. The defendant then prayed the opinion of the court, and their direction to the jury, that the patent of *Part of Wood's Inclosure*, cannot relate to the date of the certificate thereof, or to the time of paying the caution money on the certificate, so as to overreach the title of the defendant under the patent of *The Resurvey on Hobson's Choice*, but that the title under the last mentioned patent, is an elder title than that under the certificate of *Part of Wood's Inclosure*. He also prayed the opinion of the court, &c. that if from the evidence the jury do not find that the certificate of *John Howard* was returned to and in the land office when *Basil Dorsey* compounded on the certificate for *The Resurvey on Hobson's Choice*, and obtained his patent for the same, that in that event *B. Dorsey*, though the payment of the composition money made by him was not within two years after the date of the warrant in virtue of which *The Resurvey on Hobson's Choice* was resurveyed, was a fair purchaser for a valuable consideration, without

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notice of the equitable interest of *J. Howard*, and the patent to *B. Dorsey* cannot be overreached or defeated by relation. And he further prayed the opinion and direction of the court, &c. that if the jury should be of opinion, from the evidence before them, that the assignment by *H. M. Dulany* to *B. Dorsey*, was made before the 18th of April 1755, then the payment of the caution money made by him on his certificate of *The Resurvey on Hobson's Choice*, will take effect and have operation in the same manner as if the payment had been made before the 18th of April 1755.

Chase, Ch. J. The court are of opinion, that if it appears to the jury that the warrant of resurvey, taken out by *John Howard*, was located on the 5th of March 1753, and the certificate was returned on or before the 18th of April 1753, when the warrant of resurvey on *Hobson's Choice* was taken out by *John Carmack*, *Stephen* and *Daniel Richards*, and that the composition money was paid by *Philip Hammond*, the assignee of *Howard*, within two years from the date of his warrant, then the patent to *Philip Hammond*, and others, will operate from the date of the certificate. But if the certificate on the warrant taken out by *J. Howard* was not returned to, and in the land office on the 18th of April 1753, and the jury find that *Carmack* and *Richards*, or *B. Dorsey*, did compound on the certificate on the warrant on *Hobson's Choice*, within two years from the date of that warrant, then the patent to *Hammond* and others cannot operate by relation to the date of the certificate, and overreach the patent to *B. Dorsey*.

But if the jury do not find the composition money was paid within two years from the date of the warrant, by *Carmack* and *Richards*, or *B. Dorsey*, and do find that the certificate of *J. Howard* was returned to, and in the land office when *B. Dorsey* compounded on the certificate for *The Resurvey on Hobson's Choice*, then the patent to *Hammond* and others will operate by relation to the certificate: but if the jury do not find that the certificate of *J. Howard* was returned to, and in the land office when *B. Dorsey* compounded on the certificate for *The Resurvey on Hobson's Choice*, and obtained his patent for the same, in that event *B. Dorsey*, though the payment of the composition money made by him was not within two years

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after the date of the warrant, in virtue of which *The Resurvey on Hobson's Choice* was resurveyed, was a fair purchaser for a valuable consideration without notice of the equitable interest of *J. Howard*, and the patent to *B. Dorsey* cannot be overreached or defeated by relation—The court being of opinion, that as the land, (on which the warrant of resurvey of *J. Howard* was located,) was not contiguous to the original tract resurveyed, there could be no legal notice of the location of the warrant but on return of the certificate to the land office.

The court are also of opinion, that if warrant was applied by *Carmack* and *Richards*, or *B. Dorsey*, in payment of the caution money, within two years from the date of the warrant granted to *Carmack* and *Richards*, that such application of warrant will be equivalent to the payment of so much money. But the court are also of opinion, that, although the assignment by *H. M. Dulany* to *B. Dorsey* was made before the 18th of April 1755, the payment of the caution money made by him will not take effect as a payment unless the warrant was so applied by him within two years from the date of the warrant. The defendant excepted.

Where the composition money was not paid in time under a regular warrant and certificate, but was paid when a certificate of an irregular resurvey under an irregular warrant was in the office, the grant on the latter resurvey will operate by relation to the certificate. But if the latter certificate was not in the office when the composition money on the former was paid, tho' not in time, then the grant on the former cannot be overreached or defeated by relation.

3. The plaintiff then offered to prove that the usage and custom of returning certificates to the land office was, that the surveyors who made the certificates respectively returned them to the land office, and from the land office the certificates were sent by the clerk or register to the examiner-general for examination, by whom again they were generally returned to the land office. He then prayed the opinion of the court, and their direction to the jury, that if they do find the composition money was not paid within two years from the 18th of April 1753 by *Carmack* and *Richards*, or *B. Dorsey*, that then the patent to *P. Hammond* and others will operate by relation to the certificate, although the jury shall find that the certificate was not returned to the land office before the 18th of April 1753; provided the composition money was paid on the certificate of *Part of Wood's Inclosure* before the composition money was paid on the survey made in pursuance of the warrant of resurvey which issued on the 18th of April 1753. He also prayed the direction of the court to the jury, that the

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application of common warrant to compound on the resurvey made under the warrant of the 18th of April 1753, can have no other effect than if the caution money had been paid in money; and that although they find that the common warrant, which was applied as composition money, issued on the 5th of April 1755, yet it can only be considered a payment for the land included in the survey made under the warrant of the 18th of April 1753, from the time it was applied as a payment, and cannot go back, either to the 5th of April 1755, or to the time it was assigned to *B. Dorsey* who made the payment with it.

Chase, Ch. J. delivered the same opinion of the court, as that given on the defendant's prayer in the preceding bill of exceptions, excluding the first section of that opinion. The plaintiff excepted; and the defendant also excepted to so much of the opinion of the court as determines, that under the circumstances as stated, which in the opinion of the court, will entitle the patent for *Part of Wood's Inclosure* to a relation to the certificate so as to overreach the patent for *The Resurvey on Hobson's Choice*, under which the defendant makes title.

If the plaintiff's grant operated by relation from the date of the certificate, and overreached an elder grant for the same land to the defendant, the entry of the grantee under the elder, and the possession by him and those claiming under him, was without right, and cannot bar the plaintiff, unless such possession was by actual enclosures for 20 years prior to the bringing the ejectment.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures.

4. The defendant then offered evidence that *B. Dorsey*, the patentee, in virtue of his resurvey, entered into, and was possessed of *The Resurvey on Hobson's Choice* in the year 1755, and continued so possessed until his death, which happened in the year 1763; that by his will he devised the land to his son *Dennis* in tail, remainder to his daughters. That in the month of April 1774, *Dennis Dorsey*, the devisee, then a minor of the age of 18 years, entered upon *The Resurvey on Hobson's Choice*, and had the same surveyed and run out; that he continued so to possess that land until his death, which happened in the year 1778. That *D. Dorsey* died intestate and without issue, leaving three sisters, to wit, *Ariana*, married to *Thomas Sollers*, *Eleanor* married to *Upton Sheredine*, and *Elizabeth* married to *Ephraim Howard*. That after the death of *D. Dorsey*, the said *Sollers*, *Sheredine* and *Howard*, in right of their wives, entered into the land, and were possessed thereof until the 22d of February 1779, when they, together with their wives, conveyed the land to the present defendant, who in virtue of that deed entered into the land

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on the same day, and was possessed thereof, and has continued so possessed until this time. He then offered in evidence, from the rent rolls in the land office, that the said land, upon being patented to *B. Dorsey*, was also charged to him in the rent rolls; and also the debt books of the late Lord Proprietary, whereby it appears that the quit rents due upon the said land were in the debt books charged to *B. Dorsey*, and were by him paid from the year 1756, until his death in 1763; and that after his death, the quit rents were in the debt books charged to, and paid by, *D. Dorsey* the devisee, from the year 1763, until the revolution abolished the proprietary quit rents. The defendant then prayed the opinion of the court, and their direction to the jury, that if they should be of opinion, from the whole evidence before them, that *B. Dorsey* came into the actual possession of *The Resurvey on Hobson's Choice*, claiming the whole thereof under and by virtue of the patent thereof granted to him, before the 3d of May 1760, when *P. Hammond*, the father of *Charles*, and grand-father of *Philip*, one of the lessors of the plaintiff, died, and that *B. Dorsey* was on that day in the actual possession of that tract, claiming the whole, and that he, and those claiming under him, other than the lessors of the plaintiff, and those under whom they claim, have been in the actual possession thereof, claiming the whole, from the day last aforesaid until the time of bringing this action, then the plaintiff cannot recover, unless it should be satisfactorily proved to the jury, on his part, that *Charles Hammond*, son of *Philip*, or some person claiming under him, made an actual entry into *Part of Wood's Inclosure*, claiming the whole thereof, at some time within twenty years next after the 3d of May 1760.

Harper, for the Defendant, cited *Russell's Lessee vs. Baker*, 1 *Harr. & Johns.* 71. *Davidson's Lessee vs. Beatty*, 3 *Harr. & M'Hen.* 594. *Miller's Lessee vs. Hynson*, (in the Provincial Court, May term 1734.) *Hawkins's Lessee vs. Bolton*, (*Ibid*, April term 1745.) *M'Crackin et ux. Lessee vs. Harris*, (*Ibid*, May term 1748.) 2 *Blk. Com.* 311, 312. *Co. Litt.* 15, a, *Sect.* 8. *Taylor vs. Horde, et al.* 1 *Burr.* 119. *Bac. Ab.* tit. *Trespass*, (C. 3.) *Bro. Ab.* tit. *Surrender*, 245. b. 1 *Leon.* 209. 2 *Leon.* 147. 4 *Leon.* 184. 2 *Roll. Ab.* tit. *Trespass*, 553, 554.

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CHASE, Ch. J. A naked possession, (possession without right,) is only adversary to the extent of actual enclosures. If the patent to *P. Hammond* and others relates to the certificate, the *Dorseys* and the defendant had only a naked possession, and limitation by adversary possession is only to the extent of enclosures.

The court are of opinion, that if the patent to *P. Hammond* and others doth operate by relation from the date of the certificate, that in such event the patent to *B. Dorsey* for *The Resurvey on Hobson's Choice*, which is stated to be included in the patent to *P. Hammond*, and others, doth not pass any thing, but is altogether inoperative, and the entry of *B. Dorsey*, and the possession by him, and those claiming under him, was without right, and that such possession cannot bar the plaintiff, if the jury do find the facts stated by the plaintiff, unless they also find that such possession was by actual inclosures for twenty years or upwards, prior to the bringing this ejectment; and in such case, it would only be a bar to the extent of such actual adversary possession by enclosure. The defendant excepted.

The relation of a grant to the certificate of survey, so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law introduced for the attainment of justice, and to prevent circuity of action.

To entitle a party to the benefit of relation, it is incumbent on him to show an equity.

5. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they find and believe the facts to be true as stated by him, that then, upon principles of law, when the patent, under which he claims, was obtained from the land office for the land included in the certificate of resurvey, the patent related to the date of the certificate, and operates to give title from that time, unless facts are proved to rebut and defeat such relation; and that the defendant, on his part, must prove all facts necessary to defeat such relation, it being only incumbent on the plaintiff to produce office copies, under seal, of the warrant, certificate and patent, to claim on his part the benefit of relation.

CHASE, Ch. J. The court are of opinion, that the relation of the patent to the certificate, so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law introduced for the attainment of justice, and to prevent circuity of action—the court doing that which a court of equity would effect.

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The court refuse to give the direction prayed, being of opinion that it is incumbent on the plaintiff to show an equity to entitle him to the benefit of relation, and the producing copies, under seal, of the warrant, certificate and patent, is not sufficient to entitle him to such benefit. The plaintiff excepted.

The time when a certificate of survey was returned to the land office, is a matter of fact determinable by the jury

6. The plaintiff having given in evidence the certificate and patent for *Part of Wood's Inclosure*, and that the certificate was examined and passed on the 6th of March 1754, and the caution money paid on the 6th of March 1754; and having proved, that before the year 1766, it was not the practice of the land office that the time of the return of the certificates should be endorsed on the certificates respectively; and also having given in evidence that, under the proprietary government, it was the usual practice for the surveyor to return to the office the certificates for the office, and for the clerk of the land office to send the certificates to the examiner-general to be examined, and for him to return the same, after examination, to the clerk of the land office; applied to the court to instruct the jury, that these facts, so offered in evidence, are sufficient to prove that the said certificate was duly returned to the land office on or before the 5th of March 1754, unless the defendant can prove the contrary.

CHASE, Ch. J. The court refuse to give the direction prayed, being of opinion, that the time when the certificate was returned, is a matter of fact determinable by the jury, upon the whole evidence relative to that fact given by the plaintiff and the defendant. The plaintiff excepted.

As to the practice relative to the returning of certificates of surveys to the land office, their examination by the examiner-general, endorsements thereon, and entries thereof, and of caveats thereto, &c the granting patents, and entries thereof, on the rent rolls

The actings and doings of a person under whom the party does not claim, are not permitted to be given in evidence against him

7. The plaintiff then offered in evidence, that the office of the examiner-general, and the office of the agent, to whom the caution money was paid, were held in the city of *Annapolis*, and that the party, after his certificate was examined and passed, and returned to the office, was accustomed to carry his certificate to the office of the agent, and pay the caution money thereon, and to bring the same back to the office; and that after the certificate was compounded on, the party could not take his certificate out of the office, without applying to the judge of the land office, and obtaining his permission for that purpose, and that before the certificate was taken out on such permission, the party

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was required to give a receipt for the same, which receipt was kept in a memorandum book for that and other purposes. It was offered in evidence, that the said memorandum book, as well as other memorandum books, which had been kept for particular purposes in the land office under the proprietary government, have been lost or destroyed. That in such instances, under the proprietary government, in which the parties themselves carried the certificates to the land office, they were carried there before they were examined and passed, and were sent to the examiner-general by the clerk of the land office to be examined, in the same manner as if returned into the office by the surveyor. And it was also given in evidence by *John Callahan*, Esquire, Register of the Land Office, who had been examined as to the foregoing facts, that before the year 1760, it was not the practice or usage in the land office to endorse on the certificate the time when the certificate was received into the office; that when a warrant of any kind was issued for the surveying or taking up of land, it was immediately entered up and recorded in a record book kept in the land office for that purpose; that when a person applied to the office to caveat any certificate, if the same was not in the office, or could not conveniently be found, it was usual to enter the caveat in the margin of the warrant; that under the proprietary government, a caveat docket was regularly kept, in which was also entered every caveat as soon as made; but that those dockets are now lost. That where a certificate was caveated, the judge of the land office did not act upon the caveat and dismiss the same, under the proprietary government, unless the certificate was in the office; that the witness knew of no instance to the contrary; and that it was the usual practice to endorse the dismissal of the caveat on the certificate. That if a caveat was entered, it was not the usage of the office to have patents made out, sent to the governor to be sealed, returned to the office and recorded, until a hearing and dismissal of the caveat; and that although the caveat had remained more than six months unacted upon and unrenewed, yet it was not the practice and usage of the land office, under the proprietary government, to have the caveat dismissed, and patent issued and recorded, unless on particular application of the party entitled to the patent The plaintiff further offered

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in evidence, that the said *Callahan* was, when examined, in the forty-ninth year of his age; that he first went to write in the land office in the latter end of the year 1767, and continued in that office nearly the whole time, until the formation and adoption of our present government; that when he went to write in the land office, *William Steuart* was the clerk of the land office, and continued such until some time in the year 1774, when *David Steuart* succeeded him in the said appointment, and continued to hold that office until the appointment of *Saint George Peale*, as register of the land office, in April 1777; and that at the time the said *Callahan* first went to write in the land office, *Saint George Peale* was the eldest clerk or writer in that office, employed by *William Steuart*, (who was not very often himself in the office,) and remained so until he was appointed register. That during the *American* revolution, to wit, sometime in the month of January 1776, the books, records and papers, belonging to the land office, were packed up and removed to *Upper Marlborough*, where they were kept until sometime in July 1778, when they were brought back again to the city of *Annapolis*, and that by such removal some loss and injury had happened to some of the books and papers. The plaintiff further offered in evidence the assignment of the certificate for *Part of Wood's Inclosure*, and that it was made and executed on a separate piece of paper, and that the assignment is annexed, by wafers, to one side of a sheet of the original certificate in the land office, and that the side of the sheet, to which it is so annexed, is blank, and not written upon. The assignment is of "the certificate returned on a certain resurvey had and made upon 86 acres of land, being part of a tract of land called *Wood's Inclosure*, originally taken up by *Joseph Wood.*" He further offered in evidence, that the certificate of *Part of Wood's Inclosure*, now remaining in the land office, comprizes and is written upon two sheets of paper; and that the said *Callahan* had no knowledge that the certificate was ever out of the office from the time the caution money was paid thereon. The said *Callahan* further in his testimony declared, that he had no knowledge what was the usage and practice in the land office in the year 1753, and for many years after; that when he spoke of the usages and practices of the land office, he meant the usages and practices while

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he was a writer therein, which he supposes conformable to the usages and practices which had been in former periods adopted. That it was the general practice of the land office, and that he did not recollect an instance to the contrary, that caveats were not heard and decided upon, unless the certificate caveated was in the office at the time of decision; and that it was the practice to note on the certificates caveated, the decisions made thereon allowing or disallowing the caveats. The plaintiff also offered in evidence three original certificates from the land office, with the warrants under which the surveys were made, and the endorsements in the margin of the warrants of caveats having been entered against patents issuing on those certificates, and that neither the caveats, the orders, nor decisions made thereon, appear on the certificates. He also offered in evidence a large bundle of original certificates, returned to the land office, from *Frederick* county, for the year 1755, amounting to the number of 120, and the same were brought into court, and offered in evidence in the order in which they were found in the land office, and that in the number aforesaid there were only three certificates on which caveats were noted. The defendant then offered to prove, that there is no endorsement upon the certificate now in the land office for *Part of Wood's Inclosure*, of the time when it was returned to the land office; and also proved by *John Callahan*, esquire, register of the land office, that when a certificate of survey or resurvey was returned to the said office, and remained there, and was caveated by any person who opposed a grant issuing thereon, it was customary to endorse the entering of the caveat upon the back of the certificate so caveated, but that if the certificate was not in the land office when the caveat was so entered, that then it was customary to make an entry of the caveat in the margin of the warrant book, opposite to the warrant upon which the certificate was founded. He then produced from the land office, and showed to the jury, the warrant upon which this certificate was founded, and the book in which the same is entered; and also showed, that in the margin thereof, opposite to the warrant, it is entered that *Greenbury Ridgely* did, on the 12th day of July 1754, enter a caveat against a grant issuing on the certificate for *Part of Wood's Inclosure*. He then pro-

duced the original certificate for *Part of Wood's Inclosure*, and from the same showed to the jury that there is no entry upon that certificate, made by any clerk or officer in the land office, by which it can be inferred that the same was in the land office, until the 30th of January 1772, when there is an entry thereon that the same was caveated by *Philip Rezin*, and *Matthias Hammond*, sons of *P. Hammond*, (to whom the same certificate had been assigned by *J. Howard*,) and that the certificate has no plot or table of courses annexed thereto, or filed therewith. He then offered in evidence, that although it was customary for the surveyor, who made out a certificate before the revolution, to return the same to the land office, from whence it was transmitted to the examiner-general, yet there was no regulation which prevented the party himself from bringing his own certificate, and carrying it himself to the examiner, previous to its coming into the land office; and that before the revolution, as well as since, it was the business of the owner of a certificate, which had been examined and passed, to carry the same to the person authorised to receive the composition money, that he might ascertain the sum to be paid thereon, and to pay the composition money to the person so authorised to receive the same. That on the 14th of June 1733, there was a proprietary order respecting the continuance of caveats, in the words following: "That no caveat be permitted to be renewed after the expiration of six months." That on the 12th of December 1768, there was a second proprietary order on the same subject, in the words following: "That no caveat be permitted to continue longer than six months, nor be renewed after that time, unless upon very special circumstances." He also offered evidence, that no charge, before the revolution, was entered upon the proprietary rent rolls for lands against any person, until the lands were patented, and no account raised against any person as the holder of lands, for quit rents as due to the proprietary, except for lands which were patented. That when such a certificate was returned to the land office, and had been examined and passed, and compounded on, it was the interest of the proprietary that it should be patented; and if such certificate remained in the land office, and there was no legal objection to patent issuing thereon, it was customary to issue a patent thereon, and charge the grantee with the quit rents

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due thereon to the proprietary. It is admitted that the whole of the evidence offered by both plaintiff and defendant, as stated herein preparatory to the taking this bill of exceptions, so far as the same is not derived from papers of the land office, herein stated and referred to, is derived from *John Callahan*, Esquire, register of the land office. That one of the three certificates, herein before referred to by the plaintiff, as the case of a certificate caveated whereon the caveat was entered in the margin of the warrant and not upon the certificate, was as followeth: The original certificate bore date on the 22d of July 1754, upon which there was a caveat entered on the 26th of February 1756, by one *J. Bayne*; that this caveat was entered on the margin of the warrant, and also on the certificate returned to, filed, and now remaining in the land office; that the said certificate was afterwards amended, and the amended certificate, bearing date on the 26th of May 1769, returned to the land office, upon which amended certificate a patent issued on the 15th of November 1769, and in the margin of the warrant, upon which the same issued, there was an entry in these words "caveat overruled. Patent issued 15 October 1769," of which proceeding there was no entry, either upon the original certificate, or upon the amended certificate. The plaintiff then offered to give in evidence a petition preferred by *Thomas Dorsey*, on the 29th of October 1772, to the judges of the land office, caveating the certificate for *Part of Wood's Inclosure*, which was originally drawn in the hand-writing of *Samuel Chase*, esquire, and which remains in the land office. The petition, as originally drawn, after stating the issuing the warrant, the resurvey, &c. was as follows: "That the said certificate was *never* returned to the land office, *but kept by the said Philip Hammond in his possession, till his death in the year* 1761. That the said certificate was *kept* by a certain *John Hammond*, esquire, son of the said *Philip, or by the said, a certain Charles Hammond, esquire, or one of them, from the death of the said Philip until* the month of June 1771," &c. which petition appears on the face of it to have been altered so as to read as follows: "That the said certificate was, *on the 4th of October* 1753, returned to the land office, that the said certificate was, *on the 13th of October* 1763, *withdrawn out of the land office* by a certain *John Hammond*, esquire,

son of the said *Philip*, till the month of June 1771," &c. And the plaintiff offered to give in evidence, that the alteration made in the petition, by inserting the words and figures, "*on the 4th of October* 1753," and the words and figures, "*on the 13th of October* 1763, *withdrawn out of the land office*," is in the handwriting of *St. George Peale*; and that *St. George Peale* departed this life some time in the year 1779.

CHASE, Ch. J. The court refuse to permit the plaintiff to give in evidence to the jury the petition preferred to the judges of the land office by *Thomas Dorsey*, and the alterations therein, in the hand-writing of *Saint George Peale*, as a circumstance to prove at what time the certificate for *Part of Wood's Inclosure* was returned into the land office, or to prove that it was returned into the office on or before the 5th of March 1754, the court being of opinion, that it is inadmissible for that purpose, as the defendant does not derive any interest in the land in question under *Thomas Dorsey*, by whom the petition was so preferred to the judges of the land office. The plaintiff excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued in this court at the last June term, before TILGHMAN, NICHOLSON, and GANTT, J. upon the several bills of exceptions taken at the trial by the plaintiff in the court below, being those herein numbered 3, 5, 6 and 7.

Key, and *Johnson* (Attorney General,) for the Appellant, on the *third* bill of exceptions, contended, that the relation of a patent to the certificate of survey depended alone upon those facts which appeared upon record; that a court of law could not travel out of the record and take into consideration that which did not appear of record; and that where relation had been refused at law, it was upon the ground of something appearing on record. They cited *Garretson's Lessee vs Cole*, 2 *Harr. & M'Hen.* 459. *Garretson vs Cole*, 1 *Harr. & Johns.* 370. *Morris vs Pugh*, 3 *Burr.* 1243. *Shep. Ab.* 151. That if the court could travel out of the record for proof that the certificate of survey was out of the land office, they could, with the

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serve propriety, admit parol proof that the party, claiming under a junior survey, had notice of the prior one, although it was not in the office.

On the *fifth* bill of exceptions—That if the relation of a grant to the certificate of survey was objected to, it was incumbent on the party objecting, to show that the party, claiming the relation, stood in such a situation that he was not entitled to it. They cited *Shelley's* case, 1 *Coke*, [illegible]. *Stevens vs. Brannon*, 3 *Harr.* 1536.

On the *sixth* bill of exceptions—That it was incumbent on the defendant to prove that the certificate of resurvey was out of the land office; and that unless he produced such proof, the jury were bound to presume that it was never out of the office after it had been last returned.

On the *seventh* bill of exceptions—That the interlineations in the petition, having been made by a clerk in the land office, to whom the facts must have been known, was the best evidence the nature of the case was susceptible of, and should have been admitted in evidence.

Magruder and *Harper*, for the Appellee, on the *third* and *fifth* bills of exceptions, contended, that there was no evidence given by the plaintiff below, that the certificate for *Part of Wood's Inclosure* was in the office before the patent was granted to *Bealy*; and that there was negative evidence offered by the defendant. But that even if it was in the office at that time, the relation of the grant to the certificate ought not to be allowed, as *Leonard* had violated the rules and regulations of the office, by obtaining a warrant to resurvey land in which he had no estate, and by including in his resurvey vacant land not contiguous to the original tract resurveyed. That the relation of a grant to the certificate was not a fixed and positive rule of law, but depended upon the nature of the rights, and was never allowed unless it was for prudence right. That the doctrine of relation was founded upon principles of equity, and it was the act of the law, and not of the parties, and was never allowed to divest a lawful vested estate, unless upon equitable principles. They cited *Leonard's Lessee vs. Cromwell*, 1 *Harr. & Johns.* [illegible]. *Peter's Lessee vs. Mains*, 4 *Harr. & M'Hen.* 423. *Ringgold's Lessee vs. Malott*, 1 *Harr. & Johns.* 299. *Bowie's Lessee vs. Beall*, *Ibid.* 344. *Shep. Ab.* (3d part,) 149, [illegible]

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Butler & Baker's case, 3 *Coke*, 28. b. 3 *Bl. Com.* 43. *Co. Litt.* 150. a. *Land Hold. Ass.* 137, 147, 149, 151, 152, 153, 154. They also contended, that the application of the land warrant, in payment of the composition money on *Dorsey's* resurvey, ought to be on the day it was assigned to him.

On the *sixth* bill of exceptions, that it was a matter of fact for the jury to ascertain when a certificate of survey was returned to the land office, as the time when it was returned was not endorsed thereon by the register. They cited *Carroll et al. Lessee vs. Norwood*, 1 *Harr. & Johns.* 112.

On the *seventh* bill of exceptions, they contended, 1. That the receipt of the composition money, as endorsed on the certificate, was not evidence that the certificate was, at the date of the receipt, or ever was, in the land office—the receiver not being an officer of that office. 2. That the alterations in the petition, by one of the clerks in the office, was not an official act, and could not, therefore, affect the defendant, who did not claim under the petitioner. *Curia adv. vult.*

THE COURT, at this term, concurred in the opinions pronounced by the General Court in the several bills of exceptions taken on the part of the plaintiff below.

JUDGMENT AFFIRMED.

BEALL, *et al.* Lessee *vs.* HARWOOD. DECEMBER

In the construction of an act of assembly, the intention of the legislature is to prevail, and is to be collected from the whole of the law, and the circumstances which produced it.

APPEAL from the General Court. Ejectment for a tract of land called *Buzzard Island*, lying in *Calvert* county.

Where lands had been devised by A to his son B, intail male, remainder intail male to his eldest son C, remainder intail male to his third son D, remainder in fee to his two daughters E and F, as tenants in common—B, by his petition to the legislature stated, that he had only *female issue*, (viz. two daughters, L and M,) who could not inherit the lands after his death, whereby it would descend to his eldest brother C, (who united in the petition;) the therefore prayed that an act might pass to vest an estate of inheritance in fee simple in the said lands in his female heirs, in case he should have no male heirs at the time of his death; and in default of issue of his said female heirs, the said lands to descend according to the will of his father. Which prayer being thought reasonable, the legislature by an act, reciting the facts and the prayer set forth in the petition, vested the said lands in the said female heirs of B, their heirs and assigns, with a proviso, that if B should have any male heirs lawfully at the time of his death, or that the said female heirs of B should not have issue, then the lands should descend and stand limited as by the will of A was devised. Afterwards B had a son born named C, who died in the life time of B, leaving three daughters, L, M and N. During the life of C, the lands were conveyed to him in fee by B, of which he died seized, leaving the said three daughters. B afterwards died, leaving issue his said two daughters L and M, who entered, &c. They are both since dead, M having survived L, leaving a daughter N, married to the defendant. On an agreement brought in the name of the lessee of B, and the three daughters of C—*Held*, that the words in the act of assembly, meant the two daughters of B, and that an estate in fee simple was vested in them, to be defeated and divested out of them on the happening of either of two contingencies: 1st If B left issue male at the time of his death: and 2d If B should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue, and that the plaintiff was not entitled to recover.

A mortgagor cannot support an ejectment for the land mortgaged, unless he can show that the mortgage had been satisfied previous to the bringing the ejectment.

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The defendant, (the present appellee,) took *general defence*, and issue was joined on the plea of *non cul.* 1. The plaintiff at the trial, (May term 1804,) gave in evidence a grant dated the 25th of March 1652, to *William Stone*, for the land for which the ejectment was brought. Also that *Stone*, the grantee, on the 13th of November 1717, conveyed the land in fee simple to *Leonard Hollyday*, (the first.) That *Hollyday*, on the 7th of November 1739, by his last will and testament, devised the land in question, *First.* To his son *Leonard*, (the second,) intail male. *Secondly.* Remainder intail male to his eldest son *Thomas. Thirdly.* Remainder intail male to his third son *Clement;* and *Fourthly.* Remainder in fee to his two daughters *Elizabeth* and *Mary*, as tenants in common. That *Leonard Hollyday*, (the first,) died on the 10th of December 1739, seized of the land, leaving three sons and two daughters, to wit, *Thomas*, his eldest son, *Leonard*, (the second,) his second son, *Clement*, his third son, and *Elizabeth* and *Mary*, his daughters. That *Leonard Hollyday*, (the second,) entered upon the land by virtue of the devise, and was seized thereof *prout lex postulat;* and being so seized, and having only two female children, a petition was presented to the general assembly of the province of *Maryland*, at February session 1756, and in consequence of that petition an act of assembly was enacted during the same session, *(ch.* 17,) entitled, "*An act to vest certain intailed lands therein mentioned in the female heirs of Leonard Hollyday, gentleman, in fee simple;*" reciting, that "Whereas *Thomas Hollyday* and *Leonard Hollyday*, gentlemen, by their humble petition to this general assembly, did set forth that their father, *Leonard Hollyday*, of *Prince-George's* county, gent. in the year 1741, died seized of two tracts of land lying in *Calvert* county, the one called *Buzzard Island*, and the other called *The Addition to Buzzard Island*, the whole containing 751 acres, and that by his last will and testament he devised the same to his second son *Leonard Hollyday*, one of the petitioners, and to his male heirs, and for want of such issue to his eldest son *Thomas Hollyday* and his male heirs; that *Leonard Hollyday* had only female heirs, who could not inherit the said land after his death, whereby it would descend to his eldest brother *Thomas*, who by letter had signified his consent, and is a party to the said petition; that the said land was unim-

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proved at the time of the death of their father, since which it had cost the present possessor, *Leonard Hollyday*, who lives thereon, a considerable sum of money to improve the same; that the said land had been in the possession of the father of the petitioners ever since the year 1685, and never been claimed by any other person; wherefore they prayed that an act of assembly might pass to vest an estate of inheritance in fee simple in the said land called *Buzzard Island* and *The Addition to Buzzard Island*, in the female heirs of the said *Leonard Hollyday*, in case he should have no male heirs at the time of his death, and that in default of issue in the said female heirs, the said land to descend according to the will of the father of the petitioners; and the prayer of the petitioners, in the said petition contained being thought reasonable, the same was granted, and leave given to bring in a bill according to the petitioners prayer;" and it was accordingly enacted, "that the said tract of land called *Buzzard Island* and *The Addition to Buzzard Island*, containing in the whole 751 acres, with the appurtenances, in *Calvert* county aforesaid, so as aforesaid devised by the said *Leonard Hollyday*, the father, to his second son *Leonard Hollyday*, and his male heirs, shall be and the same are hereby vested in the said female heirs of *Leonard Hollyday*, the son, their heirs and assigns, to the only use and behoof of them the said female heirs of the said *Leonard Hollyday*, the son, their heirs and assigns, for ever; *Provided always*, and it is the true intent and meaning of this act, that if the said *Leonard Hollyday* shall have any male heirs of his body at the time of his death, or that the said female heirs of the said *Leonard Hollyday* shall not have issue, that then and in such case the said land called *Buzzard Island* and *The Addition to Buzzard Island*, with the appurtenances, shall descend and stand limited as by the last will and testament of the said *Leonard Hollyday*, the testator, is devised, any law, usage or custom, to the contrary in any wise notwithstanding; *saving* to the King's most excellent majesty, his heirs and successors, to the right honourable the Lord Proprietary, his heirs and successors, and to all and every other person and persons not mentioned in this act, bodies politick and corporate, their respective heirs and successors, all such right, title, estate, interest, claim and demand, othe than the persons claiming under the last will of the said

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Leonard Hollyday, the father, and this act, as they, every or any of them, could or might claim if this act had never been made." Afterwards *Leonard*, (the second) had a son, *Leonard*, (the third,) who died in the life-time of his father, leaving three daughters, the lessors of the plaintiff. *Leonard*, (the second) on the 1st of February 1791, in the life-time of his son *Leonard*, (the third,) by a deed of bargain and sale duly executed, acknowledged and recorded, for a valuable consideration, bargained and sold the said tracts of land, and all his right and interest therein, to his son *Leonard*, (the third,) in fee. *Leonard*, (the third,) in virtue of that deed entered upon the lands, and was seized thereof *prout lex postulat*; and being so seized, died some time in the year 1793, leaving three daughters, *Elizabeth*, *Grace Contee*, (wife of *Aquila Beall*) and *Margaret Terrett*, the lessors of the plaintiff, his only children and heirs. *Leonard*, (the second,) died in or about the year 1794, leaving issue two daughters. The defendant then gave in evidence, that *Leonard*, (the second,) before and at the time of his petition to the general assembly in 1756, and at the time of the passage of the law, herein before inserted, had issue two infant daughters, *Sarah*, born in 1754, afterwards married to *Thomas Johns*, and *Anne*, born in 1755, afterwards married to *Walter B. Cox*; that in the year 1757, *Leonard*, (the second,) had a son, *Leonard*, (the third,) who afterwards died in 1793, without issue male, leaving his father and two sisters his survivors; and that the youngest of the sisters, *Anne*, was 15 years older than *Leonard*, (the third.) That *Leonard*, (the second,) died in 1794, and his two daughters, Mrs. *Johns* and Mrs. *Cox*, survived him. And afterwards Mrs. *Johns*, and her husband, died, and her sister, Mrs. *Cox*, and her husband, survived them; on the death of *Leonard*, (the second,) without issue male, *Walter B. Cox*, and *Anne* his wife, claiming under the said act of assembly, entered upon and were seized of the lands aforesaid in the declaration mentioned, until the death of *Cox*; that *Anne Cox* survived her husband, and died seized and in possession of said lands, leaving issue by *Walter B. Cox*, a daughter, her only child and heir, who married the defendant; and that the defendant, in virtue of his said marriage, on the death of *Anne*, the mother, entered on and was seized of the lands, and yet is in possession thereof. The plaintiff then

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prayed the court to instruct the jury, that upon the aforesaid evidence, if they believed the facts so offered in evidence to be true, the plaintiff was entitled to recover.

CHASE, Ch. J. In this case the counsel have said every thing which could be suggested upon the subject. They have made use of ingenious arguments. There can be no doubt but it has been fully and ably argued on both sides.

The court think, that the intention of the legislature is to prevail, and that intention is to be collected from the whole of the law, and the circumstances which produced it.

The case is to be considered, 1st. What was the intention of the legislature? 2d. Have they used clear words to express that intention? 3d. What is the effect of the enacting clause, and does it carry their intention into effect?

The motive does not satisfactorily appear; but facts do appear in the petition, as recited in the act, which are, that the land would, by the will, vest in *Thomas*; that *Leonard* had no son, but he had daughters who could not inherit; that he had improved the land, and had a solicitude to provide for his daughters. It is apparent to the court, that *Leonard* had little or no expectation of having any other children; he had in view to provide for the children he then had. *Thomas*, his brother, knowing of the improvements made on the land by *Leonard*, and actuated by motives of affection, concurred in the petition. It appears that the operation under the will was intended to be suspended. The petition sets forth, that *Leonard* had "only female heirs, who could not inherit." This was nothing more than a description of the persons who were to take under the law. The prayer of the petition was "to vest in the female heirs" of *Leonard Hollyday*, in fee simple. "Female heirs" meant the two daughters of *Leonard Hollyday*, and that the estate was to vest *immediately* in them. It appears that the petition had in view to provide for the two daughters. The legislature granted the petition. Has the enacting clause carried the intention into effect? "shall be and are hereby vested in the said female heirs." The intention must be to vest the estate in the daughters *then in being*. It is a plain designation of the persons who were to take; and that an estate in fee simple should be

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vested in the two daughters, to be defeated only upon the happening of two contingencies. If the events, or either of them, had happened, the estate in fee simple would have divested, and let in the operation of the will. This shows, that by the act there was to be a suspension of the estate, It was the act of the father providing for his children, with a proviso in case of male heirs, or the death of his daughters without issue. *Thomas* made a greater sacrifice than *Leonard*.

What would be the effect if the construction contended for on the other side was to prevail? It would be putting it in the power of one party to defeat the provisions of the legislature. Such a construction could never be admitted, The children of *Leonard Hollyday*, (the third,) never could have inherited under the will.

The court are of opinion, that an estate in fee simple vested in the two daughters of *Leonard Hollyday*, which estate was to be defeated and divested out of the daughters, on the happening of either of two contingencies.

First. If *Leonard Hollyday*, (the second,) left issue male at the time of his death.

Second. If *Leonard Hollyday* should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue.

On the happening of either of said events, the estate in fee simple, which was created in the two daughters, was to be divested, and the limitations in the will, which were suspended by the act of the legislature for the purpose of providing for his two daughters, were to be again put in operation. And the court are of opinion, that the plaintiff is not entitled to recover the land. The plaintiff excepted.

A mortgagor cannot support an ejectment for the land mortgaged, unless the mortgage debt has been paid.

2. The defendant then read in evidence a deed of *mortgage* from *Leonard Hollyday*, (the third,) to *Benjamin Mackall*, bearing date the 2d of April 1791, for the tract of land called *Buzzard Island*, in the declaration mentioned, to secure the payment of £2179 14 1, current money, with interest, on the 1st of September 1794; and he prayed the opinion of the court, and their direction to the jury, that the plaintiff was not competent to recover by reason of the mortgage, unless he could show that the mort-

gage had been satisfied previous to the time of bringing this ejectment.

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CHASE, Ch. J. The court are of opinion, that the mortgage created a legal estate in the land in *Benjamin Mackall*, the mortgagee, and his heirs; and that the plaintiff cannot recover unless he proves the mortgage was satisfied previous to the bringing this ejectment. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before TILGHMAN, BUCHANAN and NICHOLSON, J.

Martin and *Shaaff*, for the Appellant, in arguing on the *first* bill of exceptions, stated, that the question for discussion arose wholly out of the act of assembly of 1756, *ch.* 17, and three different constructions of that act they contended for in opposition to the opinion of the court below —1. That *Leonard*, (2d,) still continued tenant in tail, as before, with a limitation to his female heirs in case of his dying without issue male, with power of alienation, &c. and that his deed to *Leonard*, (3d,) of the 1st of February 1791, barred the estate tail, and vested a fee in the grantee. 2. Or, that the act gave the estate beyond the control of the tenant, to such persons as at the time of the death of *Leonard*, (2d,) answered the description of his heirs female, as purchasers, including all those who, at his death in 1794, would have been his heirs female, viz. his two daughters, Mrs. *Johns* and Mrs. *Cox*, and also his granddaughters, the children of *Leonard*, (3d.) 3. Or, that the act gave the estate beyond the control of the tenant to such persons, as, according to the meaning of the terms when the law passed in 1756, answered the description of heirs female of *Leonard*, (2d;) that is, females who were heirs also, viz. the daughters, the heirs of *Leonard*, (3d.) They cited *Shelley's* case, 1 *Coke*, 102, 103. *Shep. T.* 103. *Chew's Lessee vs. Weems*, 1 *Harr. & M'Hen.* 463 *(a.)*

(a) In *Chew's Lessee vs. Weems*, notwithstanding the decision of the Court of Appeals, a new ejectment was brought after the revolution, in 1778, and the General Court, at *October* term 1782, gave the same judgment, which had been given by the Provincial Court, from which there was also an appeal by the plaintiff to the Court of Appeals; but that appeal was not acted on, the case hav-

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On the *second* bill of exceptions, they contended, that where the title to land is contested between the mortgagor and a stranger, the latter cannot set up the mortgage to defeat the recovery. They cited *Pow. on Mort.* 221, 222. *The King vs. St. Michael's, Dougl.* 632. *Lade vs. Holford*, 3 *Burr.* 1416. *Doe vs. Bristow & Pegge*, 1 *T. R.* 758, *(note.)*

Key, *Mason*, and *Johnson*, (Attorney General,) for the Appellee, on the *first* bill of exceptions, contended, 1. That the inheritance and estate was immediately vested in the daughters in fee by force of the clear words of the act of assembly. 2. That if the estate did not immediately pass to the daughters, the inheritance in fee was vested in them, subject to a life estate in their father, and liable to be divested from them on the father's death, leaving a male heir then living. 3. That if the inheritance in fee was not vested in the daughters on the passage of the law, it was an executory grant to vest on a contingency to happen within a life in being, and like an executory devise not capable of being barred by deed or common recovery. They cited *Wheatley vs. Thomas*, 1 *Lev.* 75. *Walker vs. Collier*, *Cro. Eliz.* 379. *Co. Litt.* 27, a. *Prince's* case, 8 *Coke*, 1. *Murrey vs. Eyton & Price*, *T. Raym.* 355. *Shep. T.* 108, 109, 119. *Pow. on Cont.* 336, 337, 376, 377. *Pow. on Dev.* 376, 377.

On the *second* bill of exceptions, they cited *Doe vs. Wharton & Dixon*, 8 *T. R.* 2. *Doe vs. Staple*, 2 *T. R.* 696. *Armstrong vs. Peirse, et al.* 3 *Burr.* 1901.

The Court concurred in the opinions expressed by the General Court, in both of the bills of exceptions, and

JUDGMENT AFFIRMED.

DECEMBER.

A grant of land is to be construed most favorably for the grantee.

Land included in a grant, but excluded from the certificate of survey on which the grant issued, cannot be taken up as vacant land

A grant of land cannot be corrected or controled by the certificate of survey, but will pass the land comprehended within the courses and distances expressed in the grant.

If a grant is for more land than is contained in the certificate of survey, it may be vacated in the court of chancery; and if it is for less land, the grantee's remedy, if any, is in equity.

Tolson's Lessee *vs.* Lanham.

Appeal from the General Court *Ejectment* brought by the appellant for a tract of land called *Tolson's Enlarge-*

ing been entered *agreed* at May term 1783. See also 3 *Atk.* 193. *Mod.* 422. *Cro. Eliz.* 525. *Pollexf.* 645. 2 *Stra.* 1175. 3 *Atk.* 590, 608. 1 *Wils.* 140. 2 *Ves.* 249. 3 *T. R.* 470. 2 *Atk.* 646. 1 *P. Wms.* 432. 1 *Ves.* 217.

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ment, lying in *Prince-George's* county. The following case was stated for the opinion of the court. A tract of land called *Hunter's Folly*, was surveyed on the 29th of November 1706, for *William Hunter*, as by the certificate thereof exhibited, and by which it was described as "beginning at a bounded Spanish oak, and running S. 75° E. 84 ps. N. W. 159 ps. then N. 74° E. 160 ps. then N. W. 280 ps. to a black oak bounded, then S. 21° W. 185 ps. then with a straight line to the first boundary, containing and laid out for 334 acres of land more or less." A patent issued on this certificate the 10th of June 1708, for the tract called *Hunter's Folly*, describing it as "beginning at a bounded Spanish oak, and running S. 75° E. 84 ps. *then N. 25° E. 84 ps.* then N. W. 159 ps. then N. 74° E. 160 ps. then N. W. 280 ps. to a black oak, then S. 21° W. 185 ps. then with a straight line to the first tree, containing and laid out for 334 acres of land more or less, according to the certificate of survey thereof taken and returned into our land office, bearing date the 29th of November 1706." The tract called *Tolson's Enlargement* for which this suit was instituted, is not included in the *certificate* of survey of *Hunter's Folly*, but is included in the patent which issued on the certificate; it being admitted that there is a variance between the certificate and patent, and that the latter comprehends more land than the former. The lessor of the plaintiff, before the institution of this ejectment, took up the land, in the declaration of ejectment mentioned, as vacant land not included in the certificate of survey of the tract called *Hunter's Folly*, and he duly obtained a patent for the same.

Chase, Ch. J. The question is, whether the land mentioned in the declaration was not liable to be taken up as vacancy, it being excluded by the *certificate* of survey of *Hunter's Folly*, but included within the courses expressed in the *patent* for the said land? Whether the defendant can hold more land under his grant than what is comprehended in the certificate of survey?

The court are of opinion, that the grant is to be construed most favourably for the grantee. The lord proprietary could not grant what had already passed from him, without first going into chancery to vacate the former grant;

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and had less land passed by the patent than was contained in the certificate, the defendant's remedy, if any, must have been in equity.

Judgment was entered for the defendant, and the plaintiff appealed to this court, where the case was argued before TILGHMAN, BUCHANAN, and GANTT, J. by

T. Buchanan, for the Appellant, and by
Mason, for the Appellee.

JUDGMENT AFFIRMED.

DECEMBER.

NEGRO JAMES *vs.* GAITHER.

Parol evidence is not admissible to prove that a deed of manumission was attested in the presence of two witnesses, only one having signed the same.

A deed of manumission under the act of 1752, ch. 1, s. 4, executed in the presence of only one witness, will not operate to give freedom to the slaves mentioned therein.

APPEAL from the General Court. The petitioner, (now appellant,) filed his petition for freedom in *Anne-Arundel* county court. The case was this—A deed of manumission, dated the 13th of September 1784, was executed by *B. Gaither*, deceased, then of *Prince-George's* county, giving freedom, after his death, to sundry of his negro slaves, among whom was the petitioner, *Negro James*. The deed was signed and sealed by him in the presence of, and acknowledged before *T. Boyd*, one of the justices of the peace for *Prince-George's* county, on the 13th of September 1784, and recorded in the records of that county on the 27th of November 1784. *Gaither* by his will, dated the 20th of June 1791, devised and bequeathed as follow: "Item. I give and devise to *B. Ijams* all my land whereon I now dwell, and my several tracts or parcels of land adjoining thereto; also all my personal estate, except my negroes, and to his heirs and assigns for ever." "Item. My will and desire is, that all my young negroes, born since my negroes were recorded, shall be absolutely free at my death." The inventory, returned on *Gaither's* estate, does not include any of his slaves. *Ignatius Allen*, a witness sworn in the cause, deposed that he lived with *Gaither* at the time he sent for *T. Boyd* to take the acknowledgment of a deed to set his negroes free; that *Boyd* came and drew the deed; that after it was drawn, *Gaither* did sign, seal, and acknowledge the same as his act and deed, and did deliver the same to *Boyd*, requesting him to have it recorded. That when *Gaither* executed and signed the deed he was confined to his bed; that he called

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upon the witness to assist him in getting up in his bed to sign the deed; that the witness accordingly did assist to raise *Gaither* in his bed, and that he stood by and was present, and did see *Gaither* sign the deed, and acknowledge it as his act and deed; and also saw *Boyd* sign the same as a witness thereto. That *Gaither* asked *Boyd* if it was necessary that any one else should sign it, and *Boyd* replied it was not. That *Gaither* and *Boyd* both observed then, that there were several who also saw him sign; that *Gaither* requested the persons who were present, to wit, *Benjamin Ijams*, (who has left the state,) and *Sarah Ijams*, (who is since dead,) and also the witness in particular, all to take notice that he had signed an instrument of writing to set all his negroes free. The witness lived with *Gaither* eight or nine years after the deed was executed, and frequently heard him declare that all his negroes would be free at his death, as he had them recorded in court. That the witness cannot write his name, and did not sign the deed as a witness. That *Robert Waters*, another witness also sworn in the cause, deposed, that at the request of *Gaither* he went to draw his will, it was late in the evening, and the witness objected doing it that evening, because he alleged it was too late; but on *Gaither's* saying it would be short, he agreed to draw it. That *Gaither* told him he had deeded his negroes to be free at his death, and that the deed had been recorded several years. That after the witness had drawn the clause in the will in favour of *B. Ijams*, he told the witness to draw a clause in favour of some young negroes, and when the witness began, he told him to stop, and said it was hardly worth while, the old ones he had deeded free at his death, and the deed had been recorded for several years, and the young ones will be free, if not named in the will. But after some pause he said, however, you may do it, and do it in this way, all my young negroes, born since my negroes were recorded, to be free at my death. The clause was then wrote as stated in the will, dated the 20th of June 1791. That *Gaither* died about the year 1793, and the negroes mentioned in the deed have been at large ever since. That he never heard that any one entitled to *Gaither's* estate ever set up any claim to the negroes, until about two years ago. The County Court,

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[*H. Ridgely*, Ch. J.] at April term 1802, gave judgment for the petitioner. The defendant appealed to the General Court; and at May term 1804, the General Court [*Chase*, Ch. J. *Done* and *Spriggs*, J.] *Reversed* the judgment of the county court, and gave judgment that the appellee, the petitioner, was a slave. On an *appeal* to this court by the petitioner, the case was argued at the last term before TILGHMAN, NICHOLSON and GANTT, J.

Key and *Johnson* (Attorney General,) for the Appellant, contended that the judgment of the general court, reversing that of the county court, must be reversed, unless this court think they are bound by a rigid construction of the act of assembly of 1752, *ch.* 1, *s.* 5, by which it is enacted, "that where any person or persons possessed of any slave or slaves within this province, who are or shall be of healthy constitutions, and sound in mind and body, capable by labour to procure to him or them sufficient food and raiment, with other requisite necessaries of life, and not exceeding fifty years of age, and such person or persons, possessing such slave or slaves as aforesaid, and being willing and desirous to set free or manumit such slave or slaves, may, by writing under his, her or their hand and seal, *evidenced* by two good and sufficient witnesses at least, grant to such slave or slaves his, her or their freedom," &c. They insisted that the act does not indispensibly require that two witnesses should *subscribe* their names to the deed. That an enlarged construction ought to be given to the word *evidenced*, they referred to the *Stat. of Frauds*, 29 *Car.* II, *ch.* 3, *s.* 5. *Co. Litt.* 283. a. *Jacob's L. D.* tit. *Evidence. Windham vs. Chetwynd*, 1 *Burr.* 414. 2 *Eq. Ca. Ab.* 343, case 15. *Gitting's Lessee vs. Hall*, 1 *Harr. & Johns.* 14.

Shaaff and *T. Buchanan*, for the Appellee, also referred to the act of 1752, *ch.* 1. *Shaffer's Lessee vs. Corbett*, 3 *Harr. & M'Hen.* 513. *Ridgely vs. Howard, et al. Ibid* 321; and the act of 1796, *ch.* 67.

Curia adv. vult.

At this term

JUDGMENT AFFIRMED.

CONTEE *vs.* COOKE.

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DECEMBER.

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On a bill in chancery to be relieved against a verdict and judgment, it appeared that the application in effect was, that the chancellor act as a tribunal of appeal from the verdict. There was stated no surprise on the complainant whilst defendant at law; no discovery of testimony since the trial, and no sufficient proof of fraud. *Decreed*, that the facts set forth in the bill were not sufficient to warrant the court to interpose and grant the relief prayed.

Where certain circumstances, with the testimony of one witness, were not sufficient to refute the defendant's answer.

APPEAL from the Court of Chancery. The appellant, by his bill of complaint filed on the 24th of April 1800, stated that *Richard Wootton*, on the 5th of August 1791, assigned to him, for a valuable consideration, a bond executed by *Benjamin Burgess*, (since deceased,) and by *Thomas Tongue*, his security, dated the 21st of April 1789, conditioned for the payment of £301 12 9 current money. That suits were commenced on the bond in the general court, and a judgment was obtained against *Tongue* at May term 1793; but *Burgess*, dying before the judgment court, leave was given to issue a summons against *Agnes Burgess*, his administratrix. That the complainant was frequently applied to by *B. Burgess*, in his life-time, to resort to *Thomas Lane* for payment, against whom *Burgess* had a judgment, obtained in the name of *Richard Harwood* for his use, in the general court at October term 1790. *B. Burgess*, as the complainant understood, was much involved in debt, and alleging that he wished to pay by this judgment, the complainant was induced so far to comply with his request as to go to *Lane*, and to put himself to some inconvenience, expense and trouble, to receive tobacco and cash, to be applied towards payment of his claim against *Burgess*. That the complainant received a letter from *Burgess*, dated the 16th of October 1792, requesting him to meet at the house of *Lane* on the Thursday then next, to settle. That the complainant accordingly met, and received from *Burgess*, which he had received from *Lane*, and paid to the complainant, 1637 lbs. of tobacco, at 35*s* per hundred, and £74 6 1 cash, which was by mistake calculated to make together the sum of £104 16 6, for which he gave *Burgess* a receipt, dated the 23d of October 1792, and for which sum *Burgess* also gave a receipt to *Lane*. That the complainant, on his return home on the 25th of the same month, entered the payment on his day book as of that date, as it was his custom to do on his store books when he received money during his absence from home; but that it was entered for the correct amount of the money and tobacco, to wit, £103 16 6. That the complainant, after discovering the mistake, and wishing to furnish a statement of his account, sent his account against *Burgess* and *Tongue*, in which he charged them

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with the sum due on the judgment, and credited them, under the date of the 25th of October 1792, with the quantity of tobacco and cash, under the heads of tobacco account and cash account, amounting together to the sum of £103 16 6; but he expressly alleges, that the sum for which he gave the receipt, and the sum which he gave credit for in the account rendered, were for the same tobacco and money, and were one and the same, except the mistake in the calculation, and that he never did receive both sums separately, nor any further sum in the month of October 1792, more than is credited in his account against *Burgess* and *Tongue*, that is to say, £103 16 6, from *Burgess* and *Tongue*, or any one on their account or behalf. That *Burgess* relied entirely on *Lane* for payment of this judgment to the amount of his judgment against *Lane*; that he was not in circumstances to make payment himself without difficulty, and that he never was in the habit of making several payments in so short an interval, to the complainant's knowledge. The complainant states, that another payment was made to him in February 1793, by the purchase of a negro man from *Lane*, for £79 18 9; and that *Burgess*, in his life-time, never set up or claimed a credit on the receipt, and on the account rendered also, as separate payments, but acquiesced in the balance, as stated by the complainant; and the complainant does not believe that he left any paper or memorandum specifying such a claim. That after the death of *Burgess*, which happened before December 1793, he received from his widow, *Agnes Burgess*, (now *Agnes Cooke*, the defendant,) on the 10th of December 1793, as appears by her account, the sum of £51, by the purchase of a negro boy at a public sale of her intestate's property, which was done by him to accommodate the administratrix. The complainant was applied to at the sale to consent to the property being sold on a credit, which he agreed to for the benefit and convenience of the administratrix. That he afterwards, on the 25th of March 1795, received from *Tongue*, the security, the sum of £37 9 0, and from *Lane*, in August 1795, the further sum of £153 7 2. The complainant admits that the several sums amounted together to £9 13 8 more than the balance due on the judgment against *Lane*, out of which the complainant was to be paid, but he alleges that they were not all received by him on account thereof, but that he had an

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order from Bishop *Claggett* to collect and receive from *Agnes Burgess* a sum of money due on a judgment to *Claggett*, on which account he also received afterwards from *Charles Cooke*, (who intermarried with *Agnes Burgess,)* tobacco and money to the amount of £50 4 0, as appears by an account exhibited, by which a balance appears to have been due from the complainant of £1 10 5½, which he has been and still is ready to pay. That after the intermarriage of *A. Burgess* with *Cooke*, the personal estate of *B. Burgess*, being insufficient for the payment of his debts, and *Thomas Tillard* having a claim against the estate, they put into his possession the papers belonging to the estate, with a view to his discovering any debt that might be due thereto, and the complainant received from *Tillard* a letter dated the 29th of October 1795, stating that a balance was still due from the complainant on the sum received for *Lane's* judgment of £20, and desiring payment thereof; but the complainant not admitting the sum to be due, refused to pay the same, and afterwards a suit was instituted in the general court by *Cooke*, and *Agnes* his wife, against the complainant, for money had and received, in order to recover back the sum alleged by them to be overpaid. That *Cooke* and wife rendered to the complainant an account made out by *Tillard*; the charges in which account of £103 16 6, £79 18 9, £50 5 0, £37 9 0, and £153 7 3, are the same as those above admitted by the complainant, but he expressly alleges that the charge of £15 5 6, charged by them in the account, was for a hogshead of tobacco received by him on a judgment by *A. & B. Contee* against *B. Burgess;* and that the charges in their account of £104 16 6, and £103 16 6, are for one and the same payment in the manner above stated. That while the suit against him was depending, the papers of the plaintiffs at law were by their counsel delivered to the counsel of the complainant, (the defendant in the suit,) to examine, and were by him given to *A. Contee*, who took a copy of the account, and returned all the papers to the plaintiffs' counsel. The complainant expressly declares, that he delivered to his counsel a receipt which he, the complainant, had obtained from *Barbara Lane*, one of the executors of *T. Lane*, which was a receipt from *B. Burgess* to *T. Lane* for the said sum of £104 16 6, or near that sum, for which the complainant had given to *B. Burgess* a receipt dated the 23d of Octo-

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ber 1792. That the complainant's counsel, *William Cooke*, Esquire, left the court before the expiration of October term 1799, and (before the complainant saw him that term,) engaged other counsel, to wit, *William Kilty*, Esquire, and put the papers into his hands, informing him that some of them belonged to the plaintiffs; and the complainant is informed and believes, that the counsel for the plaintiffs, *John T. Mason*, Esquire, had access to the papers in the hands of *William Kilty*, Esquire, and took therefrom such as he alleged to belong to his client. But at the trial court the receipt for £104 16 6, or near that sum, was not to be found, nor the account drawn off by *Tillard*; on which Mr. *Mason*, on the trial, declined at first to act as counsel, but employed another attorney, intending to give testimony as to the papers; but the complainant not knowing what was become of the papers, and wishing for nothing more than a fair trial, admitted that such papers had existed, to wit, a receipt from him to *B. Burgess*, and also from *B. Burgess* to *T. Lane*, for £104 16 6, or near that sum, dated the 23d of October 1792, and an account drawn off by *Tillard*. That at the trial the deposition of *Barbara Lane*, taken by consent, was read, in which she stated that the complainant had procured the last mentioned receipt from her, the purport of which she did not know, and that the same had not been returned, and that that circumstance, and the loss of the other papers, was artfully and unjustly made use of in argument to injure the complainant's character, and to influence the determination of the jury. The complainant solemnly declares that he did not wish or design, nor did he know that any of the papers were missing or lost before he came to the trial court, October term 1799, and when he was informed the papers were wanting, he admitted of such papers having existed. He was at court several days, and at length was so much indisposed, that he left the court, and was informed the trial came on next day when he was absent. The complainant is informed that *Tillard* was examined as an evidence for the plaintiffs, having declared, when examined on the *voir dire*, that he was not interested in the event of the suit, although he declared in the course of his testimony that he had a claim on the estate of *Burgess*, and had obtained an order to receive what might be due from the complainant in payment thereof, which ap-

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pears by his letter to the complainant of the 29th of October 1795. That evidence was also given at the trial of the above mentioned payments in tobacco and money, which were never made, in discharge of the judgment by Bishop *Claggett*, and of the tobacco due to *A. & B. Contee* on judgment, which the complainant had no means of proving, the application thereof resting solely in the knowledge of the plaintiffs; and that a verdict on the trial, was given in favour of the plaintiffs for the sum of £203 4 6 current money damages, and §15 and 1324 lbs. of tobacco, costs. The complainant states, that he is well convinced that the claim aforesaid would never have been brought against him if *B. Burgess* had lived, for he believes, that so far from there being any account or papers left by him to prove the justness of the claim, his books and papers, if produced, would show that no such claim existed, and that the judgment has been unjustly recovered. *Prayer* for an *injunction*, and relief, &c. The accounts and judgments referred to in the bill were all exhibited. The chancellor granted an *injunction* agreeably to the prayer of the complainant. The answer of *Agnes Cooke*, (*Charles Cooke*, her husband, against whom this wife *Agnes*, the bill was filed, having since died,) admitted the bond executed by *B. Burgess*, &c. That in discharge of the bond, on the 15th of April 1792, there was paid in tobacco, valued at 32s 6d pr. cwt. the price agreed on, and including the cask, the sum of £15 5 6, and on the 23d of October 1792, by *B. Burgess*, the sum of £104 16 6, for which he obtained the receipt of the complainant. That *Lane* was indebted to *Burgess*, and that *Lane*, at the request of *Burgess*, on the 25th of the same month and year, in discharge of the claim, paid in money and tobacco the sum of £103 16 6; that *Lane* also paid on the 25th of February 1793, the sum of £79 18 9, leaving a balance due on the 10th of December following in favour of the complainant, and including interest, the sum of £74 15 8. That after the death of *B. Burgess*, and before she obtained a true knowledge of the transaction, and had ascertained the sum due, the following payments were made, to wit, £50 5 0 for a negro boy sold to the complainant on the 10th of December 1793, £37 9 0 paid him on the 25th of March 1795, and £153 7 3 on the 29th of August 1795, and which payments she afterwards disco-

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vered greatly exceeded the balance due the complainant from her deceased husband. That she knows no other claim of the complainant on *Burgess's* estate, either in his own right, or as the assignee of any other of his creditors, and that the different payments were made in discharge of the above mentioned debt; that the complainant, when it was discovered he had been overpaid, did not refuse to refund on the ground that he had other claims, but because he alleged that he had not received the two sums of £103 16 6 and £104 16 6; that the defendant, to obtain back the money which had been unjustly paid, was obliged to bring suit in her name, and in the name of *Charles Cooke* her husband, and at October term 1799, by the verdict of a jury, obtained a judgment for the sum of £203 4 6, that being the sum, including interest, which had been overpaid and exceeding any just claim of the complainant. That she is informed that any defence the complainant had against her demand, either because he was charged with more money than received, or that the money was to be applied to other claims due him in any capacity whatever, were subjects for the decision of the court and jury, and the defendant, to support her claim there, was obliged to resort to disinterested evidence, according to the rules of law: that the complainant had there every advantage the law recognizes of objecting to evidence, and cannot here, because he alleges improper evidence was received, defeat the effect of the verdict. She knows of no other claim by the complainant against her husband's estate, to which he had a right to apply any of the payments; she trusts that a court of equity will not, after an administratrix had paid monies supposing them due, when it is discovered they were not due, and when a verdict and judgment are obtained for the same to be refunded, prevent her from obtaining the benefit of such verdict and judgment. A general replication was entered to the answer; and the *injunction*, on the motion of the defendant, was *dissolved* by the chancellor on the 15th of February 1805. A commission issued, under which testimony was taken, and the accounts between the parties were stated by the auditor.

The testimony taken was that of *David Weems*, who deposed that *Charles Cooke*, who married the widow of *B. Burgess*, before the institution of the suit by him and wife against *Contee*, came to the deponent and asked him to as-

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sist him in stating an account against *Contee*, but before they began to state the account, he related some circumstances in this manner, that they had *Contee's* receipt for £104 odd shillings, and also *Contee's* account, wherein there was a sum credited of about 20 shillings less than the receipt expressed, two days after the date of the receipt, which two sums he said were but one payment, *agreeably to the information he had received from his wife.* From that information the deponent refused to have any thing to do with it, or any hand in stating the account. In the course of conversation with *Cooke*, he objected to a sum charged in the account by *Contee* for commission; that on his account against *Contee* the balance was over £15, but he would take 40 dollars, and give a full discharge for the same.

The case being argued by the counsel concerned,

Hanson, Chancellor, at June term 1804, by his decree states, that "it appears to him that the application of the complainant in effect is, that the chancellor act as a tribunal of appeal from the verdict of a jury. There is stated no surprize on the complainant, whilst defendant at law; no discovery of testimony since the trial at law. There is no sufficient proof of fraud. As to that part of the deposition which has been considered as evidence of fraud, there is the answer of a defendant denying it; and the established principle of equity, respecting answers which defendants are compellable to give, is well known." *Decreed*, that the bill of the complainant be *dismissed*, but without costs. From this decree the complainant appealed to this court.

The cause was argued before Chase, Ch. J. Tilghman, Buchanan, and Gantt, J.

T. Buchanan, and *Magruder*, for the Appellant, contended, 1. That the court of chancery might decree against the answer upon the testimony of one witness, where there were circumstances concurring with the testimony. They cited 1 *Harr. Chan. Pr.* 106. *Sudg. L. V.* 504. *Arnot vs. Biscoe*, 1 *Ves.* 97. *Le Neve vs. Le Neve*, 3 *Atk.* 650. *S. C.* 1 *Ves.* 66. 2. That a court of chancery might relieve against a verdict and judgment, where injustice had been done at law. *Countess of Gainsborough vs. Grif-*

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ford, 2 *P. Wms.* 426. 2 *Eq. Ca. Ab.* 245. *Bumb.* 178. *Kent vs. Brigman*, *Pre. in Chan.* 233. *Ambler vs. Wyld*, 2 *Wash. Rep.* 86. *M'Rae vs. Woods*, Ibid 80. *Cochran vs. Street*, 1 *Wash. Rep.* 79. 3 *Morg. Ess.* 90. 2 *Morg. Ess.* 16.

Johnson, (Attorney General,) for the Appellee, referred to *Gover vs. Christie & Jay*, *(ante* 67;*)* and *Garretson vs. Cole*, 1 *Harr. & Johns.* 370.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the facts set forth by the complainant in his bill of complaint, are not sufficient to warrant the court of chancery to interpose and grant the relief prayed by the complainant.

DECREE AFFIRMED.

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D G, in a letter of credit to R and B, in favour of H and G, used the following expressions: "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house."—*Held*, that the guaranty was an absolute one, and to continue until countermanded by D G.

Where the judgment of the general court, after a general verdict in *assumpsit*, was reversed, because of a defective count in the declaration.

Procedendo awarded where the court of appeals concurred with the court below in the opinion expressed in the bill of exceptions, but reversed the judgment, because of a defective count in the declaration.

GRANT *vs.* RIDSDALE *et al.*

APPEAL from the General Court. This was a special action of *assumpsit* upon a special *guarantee* for goods sold and delivered to *Hacket* and *Grant*, brought by the appellees, (the plaintiffs in the court below,) against the appellant. The declaration contained the following counts: 1. That the plaintiffs, on the 1st day of February 1799, at the special instance and request of the defendant, had before that time sold and delivered to *John Hacket* and *Alexander Grant* divers goods, wares and merchandizes; the defendant, in consideration of the same, afterwards, &c. assumed upon himself, and to the plaintiffs then and there faithfully promised, that he would well and truly pay to them as much money as they reasonably deserved to have for the goods, wares and merchandizes, so sold and delivered to *J. H.* and *A. G.* And the plaintiffs aver, that they reasonably deserved to have for the goods, wares and merchandizes, so sold and delivered to *H.* and *G.* the sum of £2000 current money, whereof the defendant, afterwards, &c. had notice. 2. That the plaintiffs, on the, &c. had, (at the special instance and request of the defendant before that time, &c. made to the plaintiffs by the defendant,) sold and delivered to *J. H.* and *A. G.* divers other goods, wares and merchandizes; the defendant, afterwards, &c.

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in consideration of the same, assumed upon himself, and to the plaintiffs then and there faithfully promised, that he would well and truly pay to them as much money as they reasonably deserved to have for the said goods, wares and merchandizes, in case *H.* and *G.* did not thereafter pay and satisfy the plaintiffs therefor. And the plaintiffs aver, that they reasonably deserved to have for the goods, wares and merchandizes, last mentioned, the sum of £2000 current money, to wit, &c. of which *H.* and *G.* and the defendant, afterwards, &c. had notice. And the plaintiffs further aver, that *H.* and *G.* although often afterwards, &c. thereto requested by the plaintiffs, have not paid in any manner, contented or satisfied, the said sum of money, or any part thereof, to the plaintiffs, but have wholly refused to pay the same to them, and still do refuse, and have become wholly unable to pay the same, and are bankrupts and insolvent, to wit, &c. Of all which the defendant afterwards, &c. had notice. 3. That *H.* and *G.* on, &c. were about to purchase and buy of the plaintiffs certain other goods, &c. to wit, &c. the defendant undertook, and to the plaintiffs did then and there faithfully promise, that he would well and truly pay to the plaintiffs as much current money as they deserve to have for the goods, &c. if the plaintiffs should sell and deliver the same to *H.* and *G.* and they should fail in making payment therefor. And the plaintiffs aver, that in consideration of the promise and undertaking of the defendant, in form aforesaid made, they did afterwards, &c. sell and deliver to *H.* and *G.* the said goods, &c. which said goods, &c. were at the time of the said sale and delivery thereof, to wit, &c. worth, and the plaintiffs deserved to have therefor, other sum of £2000 current money; of all which premises *H.* and *G.* and the defendant, afterwards, &c. had notice. And that the defendant, in consideration of the premises, afterwards, &c. assumed upon himself, and to the plaintiffs then and there faithfully promised that he would well and truly pay to them the said sum of £2000 current money, whenever he should afterwards be thereto requested. 4. That the plaintiffs, had on, &c. bargained and agreed to and with *H.* and *G.* for the purchase of certain other goods, &c. by them, *H.* and *G.* of the plaintiffs to be then and there made, for the price and sum of other £2000 current money; the defendant then and there, to wit, on, &c. assumed upon himself, and to the plaintiffs then

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and there faithfully promised, that if they would deliver the said goods, &c. to *H.* and *G.* he the defendant would well and truly pay to the plaintiffs the said sum of £2000 current money, in case *H.* and *G.* should be unable to pay for the same, or refuse to pay therefor. And the plaintiffs aver, that they, in consideration of the premises, afterwards, &c. did sell and deliver to *H.* and *G.* the said goods, &c. for the sum of £2000 current money, of which the defendant then and there had notice. And the plaintiffs aver, that *H.* and *G.* although often afterwards thereto requested by the plaintiffs, to wit, on, &c. have hitherto wholly refused to pay the said sum of £2000 current money, and do still refuse, and are become bankrupt, insolvent, and unable to pay the sum of money last mentioned, or any part thereof; by reason whereof the defendant became liable to pay to the plaintiffs the sum of money last mentioned; and being so liable the defendant, in consideration thereof, afterwards, to wit, on, &c. upon himself assumed, and to the plaintiffs then and there faithfully promised to pay them the sum of money last mentioned, when afterwards he should be thereunto requested. Nevertheless, &c. The general issue was pleaded; and at the trial at May term 1803, the following facts were proved to the jury: That one of the Mr. *Beaumonts'* of the house of *Ridsdale & Beaumonts*, the plaintiffs. was, previous to the 6th of April 1795, in the *United States*, and among other places, in the city of *Baltimore*, where the defendant then resided, and where the house of *Hackett* and *Grant* was established, soliciting orders for merchandise from his house; that the defendant wrote the following letter, on the day on which it is dated, and sent the same by his son *Alexander*, who went to *England* with a view of establishing connexions in the commercial line there with the different manufacturers, and others.

"*Baltimore*, 6 April, 1795.

Messrs. *Ridsdale* and *Beaumont*, Gentlemen—By the recommendation of Mr. *Beaumont*, I take the liberty to address you by my son *Alexander*, who visits *England* with a view of establishing connexions in the commercial line there with the different manufacturers, and others. He is concerned with Mr. *John Hacket* of this place, under the firm of *Hacket* and *Grant*. For their plan, I refer to themselves; have, therefore, only to add, that I will guarantee their engagements, should you think it necessary,

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for any transaction they may have with your house. I am, &c.

Danl. Grant."

Alexander Grant was one of the house of *Hacket* and *Grant;* and he arrived in *England* some time before the 30th of July in the said year, and delivered the letter to the plaintiffs, who, by the directions of *A. Grant*, after his arrival in *England*, and while there, shipped on the 30th July in said year, to the house of *H.* & *G.* goods to the amount of £1560 0 10 sterling. Afterwards, and some time in the fall of the said year, *A. Grant* returned to *Baltimore*, and in consequence of orders sent by *H.* and *G.* and before *A. Grant* went a second time to *England*, the plaintiffs shipped goods to *H.* and *G.* to the amount of £1103 7 0 sterling, to wit, on the 18th of February 1796; and also that *A. Grant* went a second time to *England*, and arrived there some time before the 23d of June in the year last mentioned, on which day the plaintiffs, by the directions of *H.* and *G.* and while *A. Grant* was in *England*, shipped to *H.* and *G.* other goods to the amount of £689 9 8 sterling; and that the account which they produced contains a correct statement of the mercantile transactions between the plaintiffs and *H.* & *G.* and that the balance there stated, of £707 7 2, was justly due to the plaintiffs from *H.* and *G.* who on the 30th of April 1798, acknowledged the account to be correct, and signed the same. It was further proved, that *H.* & *G.* are insolvent. No evidence was given that the plaintiffs returned any answer to the defendant's letter, or that any other correspondence took place between the defendant and the plaintiffs, at any time before the 30th of April 1798. The plaintiffs further proved, that immediately after having liquidated the account with *H.* and *G.* they required payment of them, which *H.* and *G.* declined and refused, alleging, that they were unable to pay the same; of which application and refusal immediate notice was given to the defendant by the plaintiffs, and a demand of the debt was made by them of him, who requested time to consider thereon, and advise with counsel, and afterwards gave for answer, that he would not pay the debt. The plaintiffs further proved, that after various applications to *H.* and *G.* and to the defendant, they instituted a suit on the 6th of March 1799, in the general court for the western shore,

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against *H.* and *G.* and at October term 1800, obtained judgment against them, and afterwards issued an execution against them; from which execution they were discharged by an order of the chancellor, under an insolvent law passed in 1800. The plaintiffs then applied to the court, that they would direct the jury, that upon the facts so proved and given in evidence, the defendant was answerable as the guarantee of *Hacket* and *Grant*, and that the plaintiffs were entitled to their verdict for the balance due.

CHASE, Ch. J. The court give the direction prayed for. The court are of opinion, that the goods were shipped upon the credit of the letter; and that the guarantee was to continue until countermanded by the defendant; that the goods were shipped upon the united credit of *Hacket* and *Grant*, and the defendant.

The defendant excepted to the opinion of the court, and the verdict and judgment being for the plaintiffs, the defendant appealed to this court.

The cause was argued at June term 1806, before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J.

Martin, for the Appellant, contended. 1. That the letter wrote by the appellant to the appellees was not an absolute guarantee. 2. That if it was, it did not extend beyond the first shipment after the receipt of the letter. 3. That the *allegata* and *probata* did not agree. He referred, as to the *first point*, to *Butcher vs. Andrews*, 1 *Salk.* 23. *Marriott vs. Lister*, 2 *Wils.* 141. *Jones vs. Cooper*, 1 *Coup.* 257. *Matson vs. Wharam*, 2 *T. R.* 80. On the *third point*, he insisted that the several counts in the declaration were defective; that the *first count* was similar to that in *Butcher vs. Andrews*, and *Marriott vs. Lister*, where the judgments were arrested. That in the *second count* stated a promise, in consideration of *having* sold goods to *H.* and *G.* and the evidence was, that the promise was made *before* the goods were sold. That in the *third count*, there was no averment that *H.* and *G.* did not pay for the goods; and to the *fourth count*, that the evidence offered was different from that stated in that count; that it did not pursue the letter of guarantee, which should have been set out according to its date, and in the words there-

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of; and that the facts, as they appeared in evidence, should be stated, as also ought the continuance of the guarantee. He referred to *Esp. Dig.* 140, and 2 *Went. Plead.* 555. That there was no averment in the declaration that *Ridsdale* and *Beaumont*, to whom the letter was addressed, and the plaintiffs, were the same persons.

Harper, for the Appellees, admitted that some of the objections to the declaration were well founded; and that if any one of the counts were defective, it would be fatal, if it was not cured by the verdict, which he insisted would aid the defects urged. That if there was one good count, the verdict being general, it was sufficient; and if the evidence supported any one good count, it was sufficient. That the *second count* was a good one, to which the evidence would apply. He also contended that the letter was an absolute continuing guarantee, until it should be countermanded.

Martin, in reply, insisted, that where the evidence was not stated, and any one of the counts in the declaration was defective, there was some reason to suppose there was evidence applicable to such defective count; but that if the evidence was set out, and there was any one count to which it did not apply, it was fatal.

Curia adv. vult.

THE COURT at this term concurred with the General Court in the opinion pronounced in the bill of exceptions, but *reversed* the judgment because of a defective count in the declaration.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DE SOBRY, *Ex'r. of* TERRIER DE LAISTRE, *vs.* TERRIER DE LAISTRE.

DECEMBER.

ERROR to the General Court. The defendant in error, *Lewis Augustine Terrier de Laistre*, brought an action of

Parol evidence admitted to prove the manner in which wills are made and proved in *France*

A copy of a will executed in *Philadelphia* and transmitted to the Island of *Martinique* by the testator, certified by a notary public of that Island, and returned under a commission issued to take testimony, is sufficiently authenticated by having the certificate of the chief colonial officer as to the signature of the notary public; and which, with the testimony of the testamentary executor, returned under the commission, is sufficiently proved, and may be read in evidence as the will of the deceased.

As to the manner of striking commissioners and issuing commissions to a foreign country to take testimony

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assumpsit against *Benjamin de Sobry*, executor of *Michael Terrier de Laistre*, (now plaintiff in error.) The declaration contained four counts: The *first* for £4518 17 7 current money, for sundry matters, properly chargeable in an account. The *second* for money had and received. The *third* for money laid out, expended and paid; and the *fourth* for money lent and delivered. The defendant pleaded *non assumpsit* and *plene administravit*; to which the general issues were joined.

Proof of the *French* laws in testamentary affairs, returned under commissions issued to take testimony, and admitted in evidence

How far the proceedings in a court in a foreign country is legally authenticated, and how far the exemplification thereof produced contain the whole proceedings, &c.

The mere showing the seal of a court of our own state in another court of the state, is a sufficient authentication of the judgment of the court it purports to certify

The seal of the court of a foreign country does not prove itself; but it must be proved by testimony

Parol evidence admitted to prove the seal of the court of a foreign country

Where a question comes incidentally or collaterally before the court, whether or not the same strictness in the admission of evidence, is to be observed as if the question was directly in issue?

The laws of a foreign country are to be proved by evidence, and the court are to decide what is proper evidence of such laws, and to construe them, and judge of their applicability to the question before the court

The letters of a witness permitted to be read in evidence to impeach his credit as to what he had sworn upon his examination taken under a commission, contradictory to the contents of the letters, but not to prove any other fact

If a contract is in writing it will itself show where it is to be executed; but if it does not appear on the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country

If a contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed

A contract made in a foreign country must be governed by the laws of that country, and no acknowledgment of the debt in another country can change the original nature of the debt

If the plaintiff in an action of *assumpsit* files an account in court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that he had elected by his account to consider the defendant his debtor

Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled

Personal property adheres to the person; and wherever the testator is domiciled at the time of his death, the property is to be distributed according to the laws of that country

Whatever fund in this state is answerable for debts, is answerable to all creditors alike according to the laws of the state

If the laws of this state give a preference to its citizens in the payment of the debts of a deceased, the defendant, if sued by a foreign creditor, must plead such preference

An executor *pro forma* is accountable to the testamentary executor only for the surplus remaining after payment of debts

If an heir pure and simple, heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate or succession of a person dying in *France*, so as to prevent his recovery as such under the laws of *France*, he can recover in the courts of this state on a contract made in *France*

Whether or not his having intermeddled would bar or bar his right of recovery?

It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired and the obligations created by it, and the remedy or mode of enforcing it is to be conformable to the laws of the country where the action is instituted

Where by the terms of a contract it is to be executed in another country, there the parties to it by common consent adopt the laws of that country as the rule of decision

Where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries would not be enforced in this state

Unless the jury are satisfied according to the laws of *France*, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, then such co-heir is entitled to recover as a creditor whatever the jury may find due on a contract made in *France*, according to the laws of *France*

If a contract is made in this state between foreigners, and the debtor dies in a foreign country, the creditor may recover in the courts of this state, according to the laws of this state

No part of the personal estate of a testator dying in *France*, is subject to distribution among his co-heirs, but the surplus or residuum remaining after the payment of all his debts and legacies; and a debt due to one of the co-heirs is as much entitled to payment as a debt due to a stranger, unless there is proof that there is a law of *France* which extinguishes the right or claim of the co-heir creditor with benefit of inventory, if he does not renounce as co-heir

The laws of *France* are matters of fact to be found by the jury upon evidence to be produced to them; and unless they find some law of *France* which extinguishes the claim or right of recovery of the plaintiff (being co-heir and creditor) he has a right to recover; and the court directed the jury that it did not appear to the court that there was any law of *France*, which was a legal impediment to the plaintiff's recovery

A contract made in one country with a view to the execution or performance of it in another country, is governed in all things both as to its essence and the mode of enforcing it, by the laws of the latter country

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1. In the course of the trial at October term 1804. the defendant in the court below, offered to read in evidence the testimony returned, with a commission, which he obtained at May term 1800, and which issued on the 22d of July following, to the Island of *Martinique*. This testimony was copies of the will, and several codicils, made by the defendant's testator, and certain interrogatories and answers thereto by the testamentary executor, which being extracted and translated, are as follow, viz. "Mr. *Lewis Augustin Terrier de Laistre*, having produced, as a witness, *Mr. Dominick Pechier*, merchant, dwelling in the parish of the Fort of the city of *St. Pierre*, testamentary executor of the said Mr. *Michael Augustin Terrier de Laistré*, as appointed by his will, deposited in the hands of Messrs. *D. Le Blanc* and *Ciceron*, royal notaries public of this island, the 14th of April 1797, we have administered oath to the said testamentary executor, and have interrogated him in the following manner: *Inter.* Do you know whether the said Mr. *Michael Augustin Terrier de Laistre* has put into writing his testament and last will? *Ans.* Yes. He made an olograph will, of a copy of which I was the depositary in my quality of testamentary executor. To which said olograph will is annexed a codicil, likewise olograph. *Inter.* Can you say where and when the said will was made? *Ans.* The said will bears date, *Philadelphia* 1st April, 1795, and the codicil thereto annexed, bears date *Philadelphia*, the 29th of June, 1796." "And an attested copy of the said will, and codicil thereto annexed, of the said *Michael Augustin Terrier de Laistre*, and which we have hereunto annexed, having been produced and read to the deponent, we interrogated him as follows: *Inter.* Does the paper, which has just been showed to you, express the last will and testament of the said *Michael Augustin Terrier de Laistre*, to the best of your knowledge and belief? Declare all that you know, have heard, or believe. *Ans.* I know the said paper to be the last will and testament of the said *Michael Augustin Terrier de Laistre*. *Inter.* Do you know whether the said *Michael Augustin Terrier de Laistre*, made in his life-time any other codicils in writing? *Ans.* I declare that he made three others, of which I was likewise the depositary in my quality of testamentary executor; the first, bearing date *St. Pierre, Martinique*, the 14th of April 1797, received by Messrs. *D. Le Blanc* and

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Ciceron, royal notaries of this island; and a supplement of the same day and year, signed by Messrs. *Bonifaye* and *Ciceron*; the second, *St. Pierre, Martinique*, the 25th of April of the same year, received by Messrs. *Ciceron* and *Wanter*, royal notaries of this island; and the third, *St. Pierre, Martinique*, the 10th July 1797, nine days before his death, received by Messrs. *Ciceron* and *Therry*, royal notaries of this island.

"And a legally attested copy of these three codicils hereto annexed, being produced and read to the said deponent, we interrogated him as follows: *Inter.* Are the papers now shown to you the last codicils, and do they express the last intentions of the said *Michael Augustin Terrier de Laistre? Ans.* I declare that the said papers are truly the last codicils and last intentions of the said deceased." Annexed to copies of the said will and codicils, as returned with the commission, are the following certificates, to wit:

"Collated, *Ciceron.*

"We, *John Augustin Regnaudier*, commissioner of the King, and *procureur*, (attorney,) holding for this purpose the place in the absence of Mr. *John Aman Astory*, commissioner of the King, titular senichal of *St. Pierre, Martinique*, certify to all whom it may concern, that the above signature is that of Mr. *Ciceron*, notary, dwelling in this island, and that faith ought to be given to it as well in courts of justice as thereout, and to all that he signs in that quality. In testimony whereof we have signed these presents, and thereto fixed the seal of this colony, where stamped paper is not in use. Given in our hotel at *St. Pierre, Martinique*, the 20th July 1801. *Regnaudier.*

[L. S.] Sealed at *St. Pierre, Martinique* the 20th July 1821. *Jacquier.*"

The plaintiff objected to these copies being read in evidence, because they were not legally proved and certified.

Martin, (Attorney General,) and *Purviance*, for the Defendant, stated, that by the laws of *France* there were two modes of making wills—one was a will entirely in the hand writing of the testator, which was called an *Olograph Will*; the other one written by a notary public, agreeably to the directions of the testator; and that when written and read to the testator, and by him signed, and also signed by the notary, it was a good will, and was call-

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ed a *Solemn Will.* The will offered in evidence was an *olograph will*, executed in *Philadelphia* by the testator, and by him transmitted to certain notaries public in *Martinique*, where it remained. The commission, which issued in this case, was to ascertain if there was a will, and to have a copy exhibited and proved by the executor named in the will. It was legally authenticated, according to the act of 1785, *ch.* 46. The original will could not be produced, having been lodged in the office of a notary by the testator himself, but the copy was authenticated by the notary in the manner directed by the laws of *France.*

Harper and *Boyd*, for the Plaintiff, contended, that it was a fixed principle in the law of evidence, that a will must be proved in one of three ways—1. The original must be produced, and the execution proved. 2. An authenticated copy from an office of record, properly certified. 3. If an authenticated copy is not produced, then proof that it is a true copy from the original, if the original is in the possession of a person or officer not authorised to record it. They cited *Peake's Evid.* 48, *(notes.)* 73, *(notes.) Anon.* 9 *Mod.* 66. *Henry vs. Adey*, 3 *East*, 221. *Moises vs. Thornton*, 8 *T. R.* 303; and *Stevenson vs. Myers*, 1 *Harr. & Johns.* 102.

Chase, Ch. J. The court are of opinion, that the certificate of the colonial officer of the signature of the notary public, is sufficient to authenticate the copy of the will, and that the same is sufficiently proved, and may be read in evidence to the jury.

2. The defendant also offered to read in evidence the commissions which issued in June 1803, to *Paris*, *Martinique* and *Bourdeaux*, and the returns of those commissions made at May term 1804; but which were objected to by the plaintiff, because the commissions had not been regularly issued. The facts were, that on the docket of the court at May term 1803, the entry is "commissions are ordered by consent, on the part of the defendant, to *Paris*, *Martinique* and *Bourdeaux*, on striking commissioners; if the commissions are not returned at the next term, it will then be no cause of continuance." "The defendant's commissioners

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struck the 18th June 1803, (Saturday.) See their names mentioned in a paper filed." On that paper, in the handwriting of the attorney general, (one of the attorneys for the defendant,) after naming four persons as commissioners to each place, is as follows: "An order for commissions to our commissioners, unless plaintiff strikes commissioners on Monday," (the 20th June.) There was no order made in the docket or in the minutes of the court. The court met on Monday the 20th June for the purpose of making some few entries. The jury had been discharged on Saturday the 18th June. The plaintiff, and his counsel, and the counsel of the defendant, left the court for *Baltimore* on Saturday. The defendant remained, and on Monday the 20th June, he obtained his commissions from the clerk. Neither the plaintiff, nor his counsel, had any notice of the names of the commissioners struck by the defendant, nor of the order intended to be obtained for the striking commissioners on the part of the plaintiff. Defendant, after obtaining the commissions, went to *Baltimore*, where interrogatories were prepared to be forwarded with the commissions. The interrogatories and commissions were taken to the plaintiff's counsel, and a proposition made to him to strike commissioners, if he did not approve of those persons to whom the commissions had issued, so that new commissions might be obtained. The plaintiff's counsel alleged that his client had left *Baltimore* for *Elizabeth-Town* in the state of *New-Jersey*; that he did not himself know of proper characters, nor would he consent to any thing, but would take all legal advantages. It was then proposed, (as stated on the part of the defendant,) that the counsel should write to the plaintiff, and the defendant would wait, and retain the commissions until he should hear from the plaintiff; but this was declined by the plaintiff's counsel, and the commissions were forwarded. But on the part of the plaintiff, it was stated, that the defendant proposed to wait *one post*, which the plaintiff's counsel observed would not answer, as he could not hear from the plaintiff in that time.

Chase, Ch. J. The court consider the order as not done in the usual form for striking commissioners; but it appears to have been done in the hurry of business at the

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rising of the court. Time ought always to be given for striking commissioners; and an order of court for that purpose should have been made. In this case the order is general, that the commissions were to issue on commissioners being struck. It should therefore be executed in a reasonable time. The commissions issued precipitately, without sufficient time to the plaintiff to strike commissioners; and if the case depended solely upon the docket entries, it would be considered as irregular. But upon the disclosure of facts stated in the affidavits, it appears that the plaintiff's counsel had an opportunity given him of striking commissioners. If the court had made an order, they would not have allowed more than five days for striking commissioners. The defendant, it appears, offered time—"*one post.*" Here, too, is a material fact in which the affidavits do not agree. The defendant's attorney's affidavit states, that no specific time was proposed, but generally that the defendant would wait an answer from the plaintiff; but the plaintiff's attorney's affidavit states that the time was limited to "*one post.*" The court, however, suppose this time was sufficient to obtain the names of commissioners, situated as the parties were. The irregularity of issuing the commissions was cured by these circumstances. Every thing which tends to bring the justice of the case before the court ought to be done. These commissions were returned to the last term, when this objection might have been made; and if the commissions had been considered by the court as having issued irregularly, they might have been suppressed, and the defendant would have had time to issue new commissions, upon the same terms as the former, "that if they were not returned at this term it would be no cause for a continuance." But if they had been considered as illegally issued, and if the plaintiff thought that the commissions had been improperly executed, he had then an opportunity of counteracting them, by obtaining at that time new commissions upon the same terms the defendant had obtained his; for it is an established rule of this court, that upon the return of a commission, the opposite party has a right to a continuance of the cause until the next term. For these reasons the court are of opinion, that the commissions, and the testimony taken thereunder, ought to be read to the jury.

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3. *The first bill of exceptions.* The plaintiff gave in evidence, that he is the eldest son of *Michael*, the defendant's testator. He also read to the jury two original letters from his father to him, dated at *Bourdeaux*, in *France*, and addressed to him at *Paris*, in *France*, one dated the 21st of May 1793, wherein the testator acknowledged that he had received a sum of money for the plaintiff, and as he could not invest it, he proposed to take the sum of 12,000 livres himself, at 5 p. c. interest; and the other letter, dated the 1st of August 1793, acknowledging that he had received for the plaintiff 28,000 livres from Mrs. *Aubin*. He also offered in evidence, that sometime in the year 1794, the testator, and the plaintiff, came to *Philadelphia*, where or near to which the testator resided till the 6th of April 1796; and that the plaintiff, from the time of his arrival at *Philadelphia*, until the present time, hath always resided within the *U. S.* He also read in evidence a memorandum, in the hand-writing of the testator, made in a memorandum book kept by him, which memorandum bears date on the 30th of September 1795, and is as follows, viz. "The four servants given to my eldest son by his marriage contract, to wit:

Bruno, a mulatto, hair-dresser, estimated at		4500
Antoine, my domestic hair-dresser,		3000
		Liv. 7500

Both of whom are dead.

Noel, a cook—sold,	2850	
Maydelon, a washer-woman,	2000	
		4850
		12360

N. B. He returned to me the above mentioned four servants on his departure from *Martinique*; for which said servants, as well as for the sum of 40,000 livres, which he caused to be delivered to me at *Bourdeaux*, before his departure for *North America*, my estate is responsible to him." He also read in evidence a letter from the testator to him, bearing date at *Philadelphia*, on the 22d of May 1795, and addressed to him at *Trenton*, viz. "I have not yet been able to employ myself in making use of the bill of exchange of 170 dollars, (3440 livres,) on *Havre*, but

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I will attend to it as soon as my health permits me to go out." Also another letter from the testator to him, bearing date at *Philadelphia*, on the 15th of October 1795, and addressed to him at *Trenton*, of which the following is an extract:—"I remitted to *St. Claire Claudel* your bill of exchange, drawn by *Moisy*, for 170 dollars, (3440 livres,) that he might receive payment and pass it to the credit of my account." He also gave in evidence, that all the aforementioned letters, and the memorandum, are in the handwriting of the testator, and that the letters were by him transmitted to the plaintiff, and duly received, according to their respective dates and addresses; and they were offered and given in evidence, to prove the debt due to the plaintiff, for which this action is brought, as stated in the account by him filed. He also gave evidence that the several sums of livres mentioned in the said letters and memorandum book, were of the value of, and amounted in the whole to the sum of $9628 63 current money of the *United States;* and that the usual and legal interest of money in *France*, and her colonies, was at the times aforesaid five *per centum*. He also gave in evidence, that the testator departed this life on or about the 20th of July 1797, and that the defendant, as his executor, did, in the month of October in the same year, receive into his hands money belonging to the estate of the deceased to the amount of $13,092 68 current money of the *U. S.* out of which he claimed an allowance for disbursements and commissions, to the amount of $1200 07 like money, leaving in his hands, subject to the legal claims against the estate of the deceased, the sum of $11,892 61 current money. The defendant then gave in evidence, that the testator, in his life-time, duly executed certain wills and codicils, which were made and executed respectively, at the respective times and places therein respectively stated, viz. "I *Michael Augustin Terrier de Laistre*, aged 61 years, generally resident in *St. Pierre*, in the Island of *Martinique*, but now at *Philadelphia*, in *Pennsylvania*, one of the thirteen *United States* of *America*, being desirous of making known to my children my final intentions, have made and written, with my own hand, this my last will and testament, to which I particularly enjoin my eldest son to manifest his respect by an exact performance of its contents; hereby revoking all former wills and codicils by me at any time

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heretofore made, and declaring this to be alone good and valid." The bequests material to the question in controversy, are the following: 7th. "I give and bequeath unto my natural son *Chery*, now about twelve years of age, and raised from his childhood at *St. Pierre*, in *Martinique*, by *Madame Duquesnay*, the sum of *fifty thousand* livres, colonial money, payable on the partition of my estate, unless it should please better my heirs to admit him as co-heir, conformably to the tenor of the acts passed by the national assembly in favour of illegitimate children; then and in such case, I will and direct that he have his proportionable share, according to the right vested in him by law, if my heirs do not choose rather that the said sum of 50,000 livres should be paid him out of the surplus of my estate, after payment of debts, &c. Enjoining him moreover to continue to bear the name of *Chery Terrier*." 10th. "I hereby constitute and appoint *Anthony Viau*, my agent at present in *Martinique*, executor of this my last will and testament," &c. "And in case of the death or absence of the said *Anthony Viau*, I constitute and appoint, in his place, my friend Mr. *Crassous*, merchant of *Martinique*, begging him to accept this charge, with the same indemnification as aforesaid, and thereby give me this last mark of friendship." 11th. "As to all the rest and residue of my estate, whether real or personal, debts due me, &c. which I may leave in *America*, I constitute and appoint Messrs. *De Saa*, father and son, executors thereof, to administrate on that property only of which I may die possessed in *America*, conformably to my intentions expressed in this my last will and testament, of which I have left them an authenticated copy." 12th. "I hereby name and constitute my eldest son, *Lewis Augustin Blaise Terrier de Laistre*, as an heir in my succession; and I also will and direct, that after my decease, a true and faithful inventory be made of all my property, out of the amount of which property, all the bequests generally expressed in the present testament shall be faithfully discharged; and in case *Anthony Mark Terrier de Laistre*, younger brother of my said eldest son, should not please to divide with him the estate of their mother, conformably to the schedule I have annexed to this my last will and testament, in which schedule his moiety is clearly designated, but should choose rather to recur to the general inventory which will be made

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after my decease, then and in such case I will, and most expressly direct, that the sum of 40,000 livres, reserved from the portion brought by me in my marriage contract, and also the sum of 2,000 livres, which I am entitled to claim and receive from my wife's estate, by virtue of the said marriage contract, the said sums amounting in all to the sum of 42,000 livres, be deducted and reserved for my grandchild, *Augustin Paul Emile*, son of my eldest son, who shall possess and enjoy the same on the surety of his judicial oath, until his said son *Augustin Paul Emile* attain the age of 21 years, or be married; and in case this reserve should give rise to any legal difficulty, I then give and bequeath, purely and simply to my said grandchild, the sum of 42,000 livres, to be employed and disposed of as above directed, and payable out of the surplus of my estate, after all my debts, and the bequests herein contained, shall be discharged. Authorising, moreover, by these presents, my eldest son to renounce my succession, and retain the portion brought by him in this marriage contract, without returning any thing to the general stock; he also claiming from my estate all that I lawfully owe him, whether for the different sums which, on my last voyage, he caused to be paid me in *France* by Madame *Aubin*, or, for the four domesticks I gave him by the said contract, and which, before his departure from *Martinique*, he delivered for my account and risk to Mr. *Viau* my attorney. 13th. "I constitute and appoint, as heir of my succession, my youngest son, *Anthony Mark Terrier de Laistre*, whether he prefers to rely on the partition of the property possessed in common by his mother and myself, according to the statement I have subjoined to this my last will and testament, in which his portion of the maternal estate is distinctly marked out, or chooses rather to recur to the general inventory to be made after my decease, out of which his portion will be ascertained by law. I also will and direct, that the share accruing to him from my estate, shall consist of immoveable property, and my will and meaning is, that the said immoveable property be not aliened by him under any pretext whatever, in order that it may descend to his issue, and in default of such issue, be equally divided among the children of his elder brother; this disposition not being regarded as an entail, but as a prudential and safe mode of securing some part of my estate

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to my grandchildren." 14th. "As the laws recently promulgated by the republic on the subject of inheritances, restrain the testator from the free disposal by will of more than one sixth part of his possessions, and allot the residue, the remaining five-fifths, to his natural heirs: and as it is impossible for me to ascertain at this juncture the amount of my property, I will and direct, that in case my two legitimate sons, or any one of them, should choose to adhere to the precise letter of the law, in opposition to the dispositions contained in this my last will and testament, then and in such case, that my natural son *Chery*, already a particular legatee by these presents, and my four natural daughters called *Adelaide*, *Mariette*, *Rosette* and *Marguerite*, also legatees as aforesaid, be all five called in as co-heirs in my succession, each respectively renouncing to his or her respective legacy, and drawing from my estate such proportionable share as the law allows. And, as for the one-sixth of my property, of which I may freely dispose, I will and direct that as soon as it is determined by the inventory, the amount of the bequest made to the mestive *Sophia*, be deducted therefrom, and paid her in full, with all possible dispatch, which bequest I hereby confirm and ratify. And I also will and direct, that the surplus of the one-sixth, after such deduction made, be divided among the other legatees named in this my last will and testament, such share accruing to each as is proportionable to the amount of his or her respective legacy." "Such are my last desires clearly expressed in the present testament, written with my own hand, and which I fully confirm and ratify, after having attentively perused and reperused the same. Done and signed by triplicate, and one copy to be deposited with Messrs. *De Saa*, father and son, appointed by these presents my executors for the administration of that alone of which I may die possessed in *America*; a second transmitted to *Martinique*, to be there lodged with a notary; and a third enclosed in my port folio, all three copies being sealed with three seals, bearing the stamp of my cypher, as may be seen in the margin, at *Philadelphia*, in *Pennsylvania*, one of the thirteen *United States* of *America*, the first day of April, in the year of our Lord 1795." A *codicil*, revoking the legacy to *Sophia*, confirming and ratifying all other parts of his will. Signed 29th of June 1796. "*Terrier de Laistre*."

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"Last will and testament of *Michael Augustin Terrier de Laistre*, done in the presence of Messrs. *Cicero & Le Blanc*, notaries of *St. Pierre*. in the Island of *Martinique*. On this 14th day of April 1797, about 11 o'clock in the morning, we the undersigned notaries attended *Michael Augustin Terrier de Laistre*, chevalier, &c. resident in the city of *St. Pierre*, &c. aged 64 years, lawful son of, &c. who being confined to his bed, infirm of body, but of sound and disposing mind, as it hath appeared to us by his several questions and observations, and wishing to arrange his temporal affairs before the moment of his death, which is uncertain, requested us to receive the subsequent codicil and expression of his testamentary desires, which he dictated word for word in the following manner:" The bequests material to be mentioned are the following: 8th. "The said testator gives and bequeaths unto his natural son *Cheri*, about 15 years of age, and raised from his infancy in this island by Madame *Duquesnay*, the sum of 50,000 livres colonial money, to be appropriated to his subsistence and education; begging his executor hereinafter named to transmit the funds requisite for the payment of the said sum to Mr. *Benjamin De Sobry*, merchant of *Baltimore*, who has had the goodness to act the part of a father towards him during the absence of the testator; entreating him therefore to continue the same parental care, and with the sum which he bequeaths to the said *Cheri*, to place him in a situation that may ensure to him a life of tranquillity and ease; enjoining moreover his said natural son to continue through life to bear the name of *Cheri Terrier*. The said testator also gives and bequeaths to the said *Cheri* his wardrobe, rings, jewels and private fire arms, which shall be found belonging to him after his decease; reserving only from the number of his jewels his diamond cypher and repeating watch, of which he has disposed by his will of the 1st of April 1795. Hereby ratifying and confirming the said disposition." 11th. "The said testator gives and bequeaths unto his friend *Benjamin De Sobry*, merchant of *Baltimore*, all his moveables and effects, of what nature soever. of which he may die possessed in *America*; and also whatever he may discover to be due to him; charging him, however, by these presents, with the payment of his debts in the said continent, [*dans le dit continent,*] if any there be: Hereby also

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fully empowering him, as well to recover whatever may be due to him, as to discharge his debts aforesaid, without being held accountable for the said effects to any person whatever." 14. "The said testator names and institutes, as his heirs in his said succession, his eldest son, *Louis Blaise*, as well as his younger, called *Anthony Marc Terrier de Laistre;* hereby constituting and appointing them his universal legatees for equal shares in his said succession; strenuously recommending to them to preserve harmony between themselves, and respect for the present codicil, which the said testator wills and directs should be fully executed in all and every part. And his will and meaning also is, that the part and portion of that one of his said sons, who shall first die *without issue*, shall remain to the survivor." 15th. "The said testator hereby constitutes and appoints, as his executor, *Dominick Peschier*, merchant of the city of *St. Pierre*, of whom he earnestly requests this good office. And in consideration that the function of executor is necessarily attended by some trouble and derangement, he begs him to accept the bequest which he now makes him, of the sum of 15,200 livres colonial money, which said sum he may take before the delivery over of his succession to the heirs; the said testator dispossessing himself of all his estate, in order to invest him with the same, from the day of his decease, conformably to custom." 16th. "The said testator revokes all other wills and codicils by him heretofore made, declaring this alone to be good and valid, as well as his will and testament, written with his own hand, of the 1st of April 1795, fully ratifying and confirming the same, and all the gifts, bequests, matters and things, therein contained, except only the changes made and designated in the present codicil; and the said testator also wills and directs, that the said testament shall be joined to the present codicil, to be returned into his hands whenever he shall please to demand the same, which has been regularly marked *ne varietur*, by the above mentioned notaries." "Done," &c.

Signed, *Terrier de Laistre.*

Ciceron & Le Blanc, Notaries.

Collated, *Ciceron.*"

Other codicils of the 14th April 1797, 25th of April 1797, and 10th July 1797, making some trifling alterations, and confirming other wills and codicils not altered, &c.

The defendant also gave in evidence, that the executor testamentary therein named, that is to say, *Dominique Peschier*, residing in the Island of *Martinique*, did take upon himself, after the death of the testator, the burthen of the execution of the wills and codicils, according to the laws of the *French* government, in force and effect in that island; and that he did on the 24th of July 1797, write to the defendant a letter, and send the same with a copy of a certain part of the will or codicil, dated the 14th of April 1797, to enable the defendant to carry into execution that part of the will in which the defendant was interested. The defendant also gave in evidence, that *Peschier* did, on the 4th of January and the 15th of December 1798, write letters to the defendant, and send the same, of which the following are true translations: That of the 4th of January 1798, is as follows: "I am glad to see by your's that you had duly received my letter of the 24th of July, which informed you of the death of Mr. *Terrier de Laistre*, (of whom I was the executor,) and forwarded you a copy of the articles of his last will and codicils, which concern you, and his son *Chery*, whom he recommends to your good cares. An inventory has been made, in legal forms, of all the credits and debits: But the latter cannot be perfectly known, because the deceased had many friends in *France*, with whom there are accounts to settle, and which cannot be done by reason of the war. It results, that the net amount of the estate cannot be ascertained, of course the inventory is imperfect, and cannot be rectified till after the war. Messrs. *Terrier de Laistre* have taken the quality of conditional heirs, and have lately applied for a delay of six months, which has been granted to them. After its expiration they will probably ask for more time, which will also be granted; and this will go on until the return of peace. Until they take a determination on the subject, I cannot dispose of any thing. All the furniture and effects which are coming to young *Chery*, have been inventoried and shut up in a cupboard. Whatever may happen, the estate is good, but the heirs wish to be perfectly acquainted with it. They have told me that they are well disposed to fulfil the will of their father, if they are not too much injured. The law grants them the option to have the community of their mother continued to the death of their father, because he had not made a legal in-

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ventory; they wish to know which is more advantageous to them, either to have the community continued, and to receive their legitim, or to take the quality of heirs. This is the actual state of the business. I am going on with the liquidations in collecting the debts, and paying what is legitimate." The letter of the 15th December 1798, states that the inventory, on account of the war, had not been completed; and it also stated, that "the heirs moreover, (one of whom, Mr. *Verrier de Laistre* the younger, is now here, and represents his brother, who is on your continent, and who has sent him his power,) being desirous to administer their properties themselves. These considerations, and the impossibility to know how long it will require for the liquidation; I say, that actuated by all these reasons, I have rendered my accounts to the heirs, who from that time, administer their properties themselves. I have already informed you, that these gentlemen oppose the execution of the will, so far as regards the legacies, and that the suit is going on. Mr. *Duquesnay* has by a decree of the court, been nominated guardian to the young *Chery*, and defends his interest in that quality. It is necessary to go on with the suit, and wait for its conclusion, in order to abide by the judgment." He also gave in evidence the proceedings in the orphans court of *Baltimore* county, upon the exhibition and proof of that part of the codicils and wills of the testator, being the 8th and 11th clauses in the will or codicil of the 14th of April 1797, as herein before mentioned, with a direction thereto annexed by the testator, requiring certain persons, in whose hands some of his effects were, to deliver the same up on notice of his death, to the defendant, and proof thereto, and to the extract of his will annexed, of the hand-writing of the testator. Upon which letters testamentary were granted to the defendant on the 15th of November 1797, and which letters testamentary the defendant also gave in evidence to the jury. He further gave in evidence, that the testator was a native of the kingdom of *France*, and for many years before his death was a citizen of the Island of *Martinique*, and resident of that Island, which was, during the whole time that he there resided, until his death, and at the time of his death, subject to, and governed by, the same laws as the other Islands of the *West Indies* dependant on the government of

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France. That the testator came to the *U. S.* on the 6th of November 1793, and left the *U. S.* to return to the Island of *Martinique*, on the 6th of September 1796, and that having arrived at that Island, he departed this life, at that place, on the 19th of July 1797. That the sum of 12,660 livres, money of the Islands, which constitutes the first charge in the plaintiff's account, is the estimated value of four slaves, which were delivered by the testator to his son, the plaintiff, as a part of his marriage portion, and which were, by the plaintiff, again returned to the testator, some time about the year 1792. That the plaintiff was not entitled, by the *French* laws regulating this question, to claim either that sum, or interest thereon, or any part thereof, as the creditor of his father, or of his father's estate, unless he absolutely and entirely repudiated and delivered up the succession, and his right as heir, after his father's death, and renounced all right in, and claim to, the succession of his father; and that the plaintiff had not so done. That the sum of 12,000 livres, in the account mentioned, was lent by the plaintiff to the testator, and at his instance received by the testator in assignats, at their nominal value, and not in specie, and that assignats at that time were only in comparison of specie, valuable in proportion as 44 to 100; and that the sum of 28,000 livres, in the account mentioned, was lent by the plaintiff, in *France*, to the testator, and by him received in *France* in assignats, and not in specie, at the nominal value of assignats, and that assignats, at the time of this loan, were only of value compared with specie as 33 to 100, and that the sum of 12,000 livres were advanced to the testator on account of the plaintiff, the 21st of May 1793, or thereabout, by Madame *Aubin Blampre*; and the sum of 28,000 livres by the same lady to the testator, on or about the 1st of August 1793; and that the plaintiff did afterwards repay the same advances to her in assignats, at their nominal value, and not in specie. That according to the *French* laws operating upon and regulating the said loans, the plaintiff is not entitled to receive interest of any kind thereon, or on either, except from the time of bringing this suit. And as to the claim in the account of 3,440 livres, the defendant gave in evidence, that one *Moisy*, being indebted to the plaintiff in the sum of $170, drew a bill in favour of the plaintiff upon his, the drawer's correspondent, in *Havre-de-*

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Grace, to be there paid in assignats, at the exchange of 20 livres for each dollar, and that the same being indorsed by the plaintiff, was delivered to the testator to be remitted to his correspondent in *France*, to receive from the person upon whom the bill was drawn the amount thereof in assignats, and that for want of proof being furnished by the plaintiff, that he had left *France* with proper passports, and had resided constantly in the *United States*, and that the plaintiff was not subject to the laws of the *French* government against emigrants, the correspondent of the testator never received any payment of the bill, and that the testator received no part thereof, but that the bill yet remains unpaid in the hands of the person to whom it was remitted. He further gave in evidence the settlement made by him in the orphans court of *Baltimore* county, whereby it appears that he charges himself with the receipt of $13,093 68 current money, received of the effects of the testator, and credits himself with $1,200 07 like money, for disbursements, debts, &c. by him paid, and for which he is allowed, leaving the sum of $11,893 61 like money, in the hands of the defendant, and which he retains, being left him by the deceased's will. That the sums with which he charged himself in the account, proceeded from the sales of divers goods, wares and merchandizes, which were in the *U. S.* when the testator died, and from certain debts which remained due in the *U. S.* to the testator, and from remittances of property which he made after his arrival at *Martinique*. That several claims of considerable value which the testator had against persons in the *U. S.* when he departed therefrom to return to *Martinique*, and which the defendant was authorised by him to receive, were afterwards paid to or settled with the testator himself, after he went to *Martinique*, and therefore did not come into the hands of the defendant, but went to increase his estate in the Island of *Martinique*; and to establish the same, the defendant offered in evidence, a letter written by the testator to the defendant, bearing date at *Martinique*, on the 20th of March 1797. The defendant also offered in evidence, the different remittances and funds remitted to the testator while in the *U. S.* including the merchandise received by *Anthony Butler*; the remittances made by him to his creditors while in the *U. S.* his expenditures while there, and the sum he carried

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from hence when he left the *U. S.* and to show and prove the same, offered in evidence certain extracts from the memorandum book produced by the plaintiff, in the handwriting of the testator, viz:

"My general account in the continent Dr.

1795.		
June 25.	Balance of 4 Bills of Exchange for my adventure,	$3,198 $\frac{35}{100}$
1796.		
June 18.	To *Duvall Monville*, received for his account by a bill of Mrs. *Auguart*, his sister,	792
July 23.	To *Viau*, net amount remitted by him as appears, &c.	4,586 $\frac{53}{100}$
		$8,576 $\frac{88}{100}$

1795.	Cr.		
Dec. 31.	By 13 months expenses, as appears by the particulars.		$1,225
1796.			
Sep. 30.	By 9 months do. do.		936
	For 22 months expenses,		$2,161
	By remittance to *St. Claire*,	800	
	By do. to *Ollie*,	2,400	
	By do. to *Eyma*,	800	
	By do. to *Dancemont*,	124 $\frac{10}{100}$	
			4,124 $\frac{10}{100}$
	For advances to divers,		
	To *Deville*, junr.	370	
	To Mrs. *Luppi*,	533	
			903
	Furnished to divers,		
	To *Chery*,	593	
	To *De Laistre*,	722	
			1,315
	For my passage 50, for my expences 3 $\frac{38}{100}$	53 $\frac{38}{100}$	
	Carried with me in specie	20	
			73 38
			$8,576 $\frac{88}{100}$

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Concluded at *Baltimore*, this 5th Septem. 1796, until the end of September."

The defendant also offered evidence to prove, that there was a debt due from the plaintiff to the testator, at the time of his death, amounting to the sum of 111,537 livres, 18 sols and 4 deniers, money of the Island of *Martinique*, which sum of money, at the time above mentioned, was of the value of $13,519 63 current money of *Maryland*, which ought to be deducted from and set off against any thing which might be due from the testator's estate to the plaintiff, even if he had any claim which as a creditor he could sustain or support. He further gave evidence, that *Pechier* did, on or about the 7th of July 1798, deliver over to the plaintiff, and his brother, *Marc Anthony Terrier de Laistre*, as heirs of the testator, the succession of the testator, and the papers relative thereto; and that the plaintiff, and his brother, have since had the same under their management, and in their possession; and that the plaintiff hath intermeddled with the estate, and acted in respect thereof as heir; and also that the succession or estate of the testator is not insolvent. He also offered evidence to prove, that the acknowledgment entered in the books and papers of the testator, produced by him, of the sums for which his succession ought to account to the plaintiff, or in the *French* language "*dont ma succession doit lui tenir (ou faire) compte*," only admits that such sums are to be settled with the plaintiff out of the estate real, personal and mixed, which he should leave at the time of his death, according as the laws of *France*, regulating the Island of *Martinique*, and there used and in force, authorises and directs. He also gave in evidence, that the devise to him is not expressed to be under any secret trust. That to prove a devise to be a secret trust, by the *French* laws, the testimony of witnesses cannot be admitted; but that the supposed secret trustee is to answer, upon oath, whether he has lent his name or not, directly or indirectly. That according to the *French* laws, regulating this case, the plaintiff has no interest or rights against the defendant, either as a debtor or legatee of the testator, or as debtor of the testator's estate, which he as a creditor, or in any manner, can enforce, unless the plaintiff had first solemnly repudiated and given up his right of inheritance to the succession, and had renounced all right,

as heir to the succession; and that the term "succession," in the *French* laws, means the whole estate real, personal and mixed, of every nature and description, whereof a testator dies seized or possessed. That the Island of *Martinique*, and the citizens thereof, are subject to, and regulated by the laws mentioned in the execution of the respective commissions which issued in this cause; and that the law is as stated in the respective commissions, by the witnesses examined on the execution of those commissions upon the legal interrogatories put to them on the execution of the commissions respectively; which interrogatories and answers thereto he offered in evidence. He also offered evidence, that the plaintiff, soon after the death of the testator, went to the Island of *Martinique*, and was residing there about a year. That no insolvency of the succession of the testator can be proved or established, so as to admit suits to be supported upon the grounds of an insolvency, unless the estate has been liquidated and settled by regular judicial proceedings in a court of justice, where the accounts are settled, and the insolvency shown, and that any person, who is to be affected by the insolvency, may, upon suit being brought against him, to be supported, in consequence of that insolvency, contest the same upon the trial, unless he was a party to the judicial proceedings establishing the insolvency, and had there an opportunity of being heard, and of contesting those proceedings. That the testator was indebted to divers persons in *France*, for debts contracted, in assignats, and otherwise, which were in his power to repay in assignats, which had become greatly depreciated; that in order to pay off his debts aforesaid, with the least sum possible, and thereby render his succession the more valuable to the plaintiff, and his other son, his heirs, he solicited the said remittances to be made to him, while in the *U. S.* and endeavoured to have property transferred to him, to employ the same, as far as there should be a surplus after his own support, to make remittances to *France* to pay and discharge those debts; and that the said remittances were not endeavoured to be procured, or his property sought to be transferred, to the *U. S.* to dispose of it contrary to the laws of *France*. He also gave in evidence what were the remittances the testator received in property, or otherways, while in the *U. S.* and that they were expended in the support of himself and

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family while in the *U. S.* and in remittances for payment of his debts. That assignats was a species of paper money, or paper currency, issued under the authority of the *French* government, since the commencement of the *French* revolution, at different times, and which, when issued, were, or since being issued became, of much less value than gold or silver current coin, and that rating the value of dollars with livres in specie, the dollar in specie is equal to five livres tournois and five sols; whereas the dollar in specie has been, and is worth much more than the same number of livres tournois in assignats, according to the different state of depreciation of assignats. The plaintiff then, to prove that the *French* laws cannot apply to, or operate upon this case, gave in evidence, that the defendant took out letters testamentary in this state upon the estate of the testator situated therein, and that the money received into his possession, as above set forth, and belonging to the estate of the deceased, was money lodged by the deceased, in his life-time, in the *U. S.* and that the money, or goods and merchandise, from the sale of which it arose, was withdrawn from the *French* dominions by the testator in his life-time, and lodged in the *U. S.* for the express purpose of evading the laws of *France* and *Martinique*, and of disposing of them by his will to the prejudice of the plaintiff, and in such a manner as those laws expressly forbid. And the plaintiff also gave in evidence the will of the testator, proved by the defendant in the orphans court of *Baltimore* county, on which letters testamentary were granted to him by that court. The plaintiff, to prove that the debt for which this action is brought is an *American* debt, and not subject in any manner to the operation of the *French* laws, gave in evidence, that the two sums of 12,000 livres and 28,000 livres, amounting to 40,000 livres, received from the plaintiff by the testator, through Madame *Aubin*, in *Bourdeaux*, were obtained from the plaintiff by the testator, under an expectation held out by the testator of his employing them beneficially in the purchase and exportation of merchandise for the benefit of the plaintiff, and that the sum of 34,925 livres, part of the 40,000 livres, were actually invested in the purchase of merchandise, by the testator in *France*, on the 29th of December 1793, and that the merchandise was on that day actually shipped by the testator to *Philadel-*

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phia, and did arrive at *Amboy*, in the state of *New Jersey*, on or before the 22d of May 1795, and were there received by the testator into his possession, and sold and disposed of for his own use and benefit, about that time. He also offered in evidence, that the sum of 40,000 livres, lent by him to the testator, were by him received with a view to the removal of the testator, and of the plaintiff, to the *U. S.* and to the repayment of the loan in the *U. S.* And for that purpose he gave in evidence a part of the will of the testator, made at *Philadelphia* on the 1st of April 1795. He also gave in evidence the aforementioned memorandum, bearing date on the 30th of September 1795; and proved that it was made in *Philadelphia*, in the *U. S.* and that at the time of making the memorandum, and also the will of the 1st April 1795, the plaintiff resided within the *U. S.* and was then known by the testator so to reside. And also to prove that the debt due to the plaintiff by the testator, as acknowledged in the will of the 1st of April 1795, and by the memorandum of the 30th of September 1795, was on the 14th of April 1797, a debt due in the *U. S.* within the legal meaning and operation of the *eleventh* clause of the will of the 14th of April 1797, and therefore chargeable on the legacy left to the defendant by the *eleventh* clause, the plaintiff gave in evidence, that from the 1st of April 1795, until the 14th of April 1797, and on those days respectively, the plaintiff constantly resided within the *U. S.* and was on those days, and during the whole of the period between them, known by the testator to reside in the *United States;* and that the words "in the said continent," or "*dans le dit continent*," in the *eleventh* clause of the will of the 14th of April 1797, mean and were intended by the testator to express, "within the *United States*." The plaintiff, to prove that by the *French* laws, if applicable to this case, he cannot be prevented from recovering in this action, gave in evidence, that by the laws, "as no man can bestow on another that which does not belong to himself, therefore every species of debt due by a testator, even those least favoured, is preferred to every species of bequest by will;" and that by those laws an heir, with benefit of inventory, who is also a creditor of the deceased, to whom he is an heir, may recover his debt, and also receive his portion of the estate; and that the children of a deceas-

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ed person, or any of them, may by the said laws require that an inventory of the estate be made and completed, and that they be allowed a reasonable time, to be settled by the courts of competent jurisdiction after such completion, to make up their determination before they elect to renounce the inheritance altogether, or to take it as heirs with benefit of inventory, within which time they may elect to take the inheritance as heirs, with benefit of inventory, whereby they do not lose their rights as creditors. And to prove that the plaintiff is heir of the testator, with benefit of inventory, and hath done no act whereby he could be rendered heir pure and simple, according to the said laws, the plaintiff gave in evidence, that he hath not in any manner intermeddled with the estate of the testator in the Island of *Martinique*, nor received any thing therefrom as heir, and that the administration of the estate hath always remained in the hands of, and been conducted by, *Dominick Pechier* of that island, the executor appointed by the will of the 14th of April 1797, who hath made an inventory of the estate conformably to the laws of that island; and that the estate in the island is wholly insolvent, and unable to pay the debts chargeable thereon. That by the *French* laws, interest is chargeable on all mercantile debts and transactions, and on money lent for the purposes of commerce, from the time of such loans respectively. The plaintiff, to prove that the defendant cannot be considered as a legatee under the *French* laws, and the laws of the said island, admitting those laws to apply to this case, and to operate upon it, and therefore cannot avail himself of the character of legatee by way of defence in this action, gave in evidence, that by the said laws any legacy given to an illegitimate child, either directly or by a declared trust, to the prejudice of the legitimate children of the testator, is void, except as to such part of such legacy as the courts of the place shall determine to be a reasonable subsistence for such illegitimate child, in proportion to the extent of the estate, and other circumstances; and that by the said laws all legacies given upon a secret trust, for whatever purpose, are absolutely void. And the plaintiff also gave in evidence, that the legacy given to the defendant, in and by the will of the 14th of April 1797, was given on a secret trust for the benefit of a certain *Cheri Terrier*, an illegitimate son of the tes-

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tator, and to the prejudice of the plaintiff, his legitimate son. The plaintiff, to prove that the will of the 14th of April 1797, and the legacy claimed by the defendant under that will, have been and are annulled, and wholly set aside by a court of competent jurisdiction in the Island of *Martinique* offered to read in evidence an exemplification of a judgment or sentence rendered by the supreme court of that island, which exemplification purports to be attested under the hand and official seal of the grand judge of the island, and is as follows: "7th of May 1801. *George* the third, by the Grace of God, King of *England*, &c. &c. To all present and to come, greeting. Between Messrs. *Terrier de Laistre*, brothers, beneficiary heirs of their father, appealing from the sentence rendered in the Senechausse of *St. Pierre* on the 20th March last, on the one part, and Mr. *Duquesnay*, as well in his own name, being a donatee of his late wife, who was a private legatee of the late Mr. *Terrier de Laistre*, as acting tutor for the minor *Chery*, private legatee of the said *Terrier de Laistre*, defendant, on the other part, and also Mrs. *Pigache*, residing in *St. Pierre*, and Mr. *De Sobry* residing in the *United States* of *America*, defendants likewise, on the other part. And between Mr. *Duquesnay* in his quality of a donatee of his said wife, who was a private legatee of the late *Terrier de Laistre*, appealing from the same decree, as to the main part thereof which condemns him to the costs, on the one part, and the said *Terrier de Laistre*, brothers, defendants, on the other part, and also Mrs. *Pigache* and Mr. *De Sobry*, likewise defendants, on the other part. And also Mr. *Duquesnay*, in his quality of tutor for the minor *Chery*, also appealing from the said decree, on the one part, and Messrs. *Terrier de Laistre*, brothers, in their said quality, defendants, on the other part, and also Mrs. *Pigache* and Mr. *De Sobry*, likewise defendants, on the other part. And also between Mrs. *Pigache*, appealing also from the same sentence, as to that part which has condemned her to the costs only, on the one part, and the said *Terrier de Laistre*, brothers, defendants, on the other part, and also the said Mr. *Duquesnay*, as well in his own name as in his quality of tutor for the minor *Chery*, and M. *De Sobry*, defendant likewise, on the other part. Seen, &c. &c. The court having heard the king's attorney general, acting in his conclusi-

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ons, and Mr. *Ducaurroy*, counsellor, in his report pronouncing upon the appeal of the said Mrs. *Pigache*, and of Mr. *Duquesnay*, as well in his own and private name, as in his quality of tutor for the minor *Chery*, have annulled the said appeal with fine and costs. And pronouncing likewise on the appeal entered by Messrs. *Terrier de Laistre*, brothers, have annulled both the appeal and the object thereof—enacting and stating, as well upon the conclusions taken by them in the main action, as upon those of the appeal—Declare the testament and codicil of the late *Terrier de Laistre*, of the 1st of April 1795, 14th April and 10th July 1797, to be null and of no effect; in consequence, reject the demand in delivery of the legacies made to them by the said testament and codicil, and the costs, notwithstanding, to be paid out of the mass of the estate. Ordain, &c. Done in the Sovereign Council of *Martinique*, on the 7th of May 1801. Delivered the present exemplification to citizen *Dominique Pechier*, merchant in *St. Pierre*, as executor of citizen *Terrier de Laistre*, at his request, on this 13th day of Germinal, 12th year of the *French* Republic, or on the 3d April 1804, (old style.)

"*Le Camus.*

"Sealed on the same day.

"*Depaz.*

"We, Grand Judge of *Martinique*, certify all whom it may concern, that the above signature is that of *C. Le Camus*, Chief Secretary of the Court of *Martinique*, and that faith ought to be given to it as well in as out of judgment. We certify farther, that stamps are not used in this colony.

(Seal.) Given at Fort *de France*, the 13th Germinal, 12th year of the Republic. Sealed with our seal, and countersigned with our signature.

"*Le Fessier, Grand Pres.*

"By the Grand Judge,

"The Secretary,

Fouchey, Son.

"*Louis Arcambal*, consul of *France* for the state of *Maryland*, one of the *United States* of *America*, residing at *Baltimore*, certify, that Mr. *Le Fessier de Grand Pre*, who has signed the above legalization, is Grand Judge of the Island of *Martinique*; that the signature is truly his, and that faith ought to be given to it, as well in as out of judgment. Certify also, that the Grand Judge is the only

authority existing in the *French* colonies for the legalization of judicial acts.

In faith of which we have signed these presents, and have thereunto affixed the seal of the consulate at (Seal.) *Baltimore*, the 6th Brumaire, year 13th, (28th October 1804.)

L. Arcambal."

The plaintiff, to prove that the attestation was in fact under the hand and seal of the said grand judge, produced and read in evidence a deposition sworn in open court, and admitted in evidence by consent of parties, so far as parol evidence is competent to prove the matters for which the deposition was so offered in evidence, which deposition is annexed to the exemplification, and is in the following words: "Personally appeared in open court, *Antoine Baudouin*, of lawful age, who being duly sworn, on his oath did say, that he is well acquainted with *Le Camus*, of *Saint Pierre*, in the Island of *Martinique*, whose signature is affixed to the paper hereto subjoined; and also with *Le Fessier, de grand pres*, of the said island, whose signature is also affixed to the said paper, and is well acquainted with the hand-writing and signature of the said *Le Camus* and *Le Fessier, grand pres*, having seen them respectively write; and that the name *Le Camus* is the proper hand-writing and signature of the said *Le Camus*, and that the name *Le Fessier, grand pres*, is the proper hand-writing and signature of the said *Le Fessier, grand pres*. And further, that he is acquainted with the seal of office of the Grand Judge of the Island and Colony of *Martinique*, and that the seal affixed to the said paper, and purporting to be affixed by the Grand Judge, is the official seal; and that the said *Le Fessier, grand pres*, is now, and was, on the 13th of Germinal, in the 12th year of the *French* Republic, Grand Judge of the Island and Colony of *Martinique*; and that he the deponent being a *French* citizen, and a resident of the said Island of *Martinique*, he is well acquainted with the laws and constitution thereof, as far as relates to the powers and functions of the Grand Judge, Military Commander and Prefect; and that the Grand Judge is, by the said constitution and government, the supreme authority and chief of the government, as to all that relates to judicial papers and proceedings, and is the sole authority by the said laws and government whereby any judicial proceedings can be authenticated. And

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that he, this deponent, is not a lawyer by profession, but a merchant, and derives his knowledge of the said constitution and government from the common practice of the place, the general understanding, and his general information as a *French* citizen, and an inhabitant of the said colony. The deponent further says, that there is not any general seal for the said colony; the Captain General having one for all affairs relating to the military department; the Prefect one for all matters relating to the finances and supplies which belong to his department; and the Grand Judge one for all matters relating to the judicial department; and that he derives this knowledge from his own experience and transactions, and from his general knowledge of the said colony and government." The defendant objected to the reading of the exemplification as evidence, because the same was not legally authenticated, and because it does not contain the whole proceedings, and is not a full record of the whole proceedings which was before, and which had taken place in, the Supreme Court of the Island of *Martinique*.

Harper and *Boyd*, for the Plaintiff, contended, 1. That in proving a foreign judgment, proof of the seal of the court, and hand-writing of the judge, was sufficient. They cited *Henry vs. Adey*, 3 *East*, 221. *Moises vs. Thornton*, 8 *T. R.* 303. *Church vs. Hubbart*, 2 *Cranch*, 238. *Peake's Evid.* 72, 73, *(notes,)* 49; and the act of 1785, *ch.* 46, *s.* 2. 2. That the record is full and complete according to the principles of the law of *England*—They cited *Peake's Evid.* 68. 5 *Bac. Ab.* tit. *Pleading*, 823: and 1 *Esp. N. P.* 6.

Martin, (Attorney General,) and *Purviance*, for the Defendant, cited *Peake's Evid.* 46, 47. 3 *Inst.* 173. *Gilb. L. E.* 17, 23. *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 141; and *Talleyrand vs. Boulanger*, 3 *Ves.* 448.

Chase, Ch. J. The Court are satisfied upon the subject, and are of opinion that the mere showing the seal of a court of our own state in another court of the state, is sufficient authentication of the judgment of the court it purports to certify. But if it is a judgment of a foreign court, the seal of the court does not prove itself, but must be proved by testimony. The court are of opinion, that

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the testimony produced in this case is sufficient to prove the seal of office of the Grand Judge of the Island and Colony of *Martinique*. As to the record's not being full enough, the court are to presume that the record produced contains all the proceedings in the court of appeals, and that it is a full record; and the court are of opinion that it is proper to be given in evidence to the jury. Besides, it is to be observed, that this record is not the matter in issue in this cause, but comes in collaterally. It seems to the court, that as this is mere matter of inducement the same strictness is not necessary; but upon this point the court do not mean to give an opinion. In the case of *Henry vs. Adey*, 3 *East*, 221, it was debt upon the very record produced. The court, however, are of opinion, that this record is sufficiently authenticated, and ought to be read in evidence to the jury. The defendant excepted.

4. The counsel differed in their ideas of the manner in which they ought to proceed as to the proof of the *French* law.

Martin (Attorney General,) for the Defendant, contended, that when it is disputed as to what are the laws of a foreign country, evidence must be given to prove what are those laws; and if there is a different construction put upon them by the parties, the court is to decide which construction is to prevail.

Chase, Ch. J. seemed to concur in this idea of the attorney general, and said that the court are to decide what is proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of the applicability of such laws, when proved, to the case before the court.

5. The defendant offered to read to the jury certain letters written to him by *Dominique Pechier*, (and admitted to be in his hand-writing,) for the purpose of controverting the testimony of the said *Pechier*, as returned with one of the commissions which issued in this cause; but the plaintiff objected to the reading of those letters, because the testimony taken was under a commission obtained by the defendant, and he cannot invalidate his own testimony.

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Chase, Ch. J. The letters being admitted to be in the hand writing of Mr. *Pechier*, the witness, the court are of opinion they may be read to the jury, for one purpose alone; that is, to impeach the credit of the witness as to what he has sworn upon his examination under the commission, contradictory to the contents of the letters; but that the letters are not admitted as evidence to prove any particular fact, which may be contained therein.

6. The plaintiff then prayed the opinion of the court, and their direction to the jury, that a contract made in one country, with a view to the execution or performance of it in another, is governed in all things, both as to its essence and the mode of enforcing it, by the laws of the latter country.

Chase, Ch. J. If the contract is in writing it will itself show where it is to be executed; but if it does not appear, by the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. But if the contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed.

7. *The second bill of exceptions.* The plaintiff prayed the opinion of the court, and their direction to the jury, that if they are of opinion, from the evidence before them, that the testator of the defendant was, on the 1st of April and the 30th of September 1797, indebted to the plaintiff in the several sums stated in his account filed in this action, or any part thereof, and that the plaintiff at those several times resided within the *U. S.* and was known by the testator so to reside; and that he, on the two first above mentioned days, acknowledged the debts, or any part of them, and directed them, or any part of them, to be paid out of his estate after his death, and on the last mentioned day directed, in and by his will of that day, that all debts in the *U. S.* should be paid out of his property in the *U. S.* bequeathed to the defendant, then the plaintiff is entitled to recover the said sums, or such part thereof as were so acknowledged and directed to be paid, or the value thereof, in current money of this state.

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Harper and *Boyd*, for the Plaintiff, cited *Thorn vs. Watkins*, 2 *Ves.* 36, 37.

Martin, (Attorney General,) for the Defendant, also cited *Thorn vs. Watkins*. *Bruce vs. Bruce*, 2 *Bos. & Pull.* 229, *(notes;)* and *Sinclair vs. Monsieur de France*, *Ibid* 363.

Chase, Ch. J. The court cannot give the direction prayed for by the counsel for the plaintiff. The court are of opinion, that the facts stated, and the acknowledgments, cannot change the nature of the contracts made between the plaintiff and the testator in *Martinique*, or prevent the construing the same according to the laws of *France*, so far as the same may be applicable to the contracts. If the contracts, by which the debt becomes due, were made in *France*, they must be governed by the laws of *France*. No acknowledgment of the debt due in this country can change the original nature of it. The great question depends upon what are the laws of *France*. If the plaintiff can establish his claim, according to the laws of *France*, no act of the testator can prevent his recovering it in this country. The plaintiff excepted.

8. *The third bill of exceptions.* The defendant further offered in evidence, that the 34,925 livres and 14 sols, alleged to have been received by the testator in *France*, and invested in goods, and shipped as before mentioned, which goods were by the testator disposed of in the *U. S.* for his use, were part of the sum of 40,000 livres, advanced by the plaintiff to the testator in May and August 1793, and by the testator received from Madam *Aubin Blampre*, and which are charged in the account exhibited in this cause, and constitute the two articles of 12,000 livres and 28,000 livres in that account, which are therein charged as received by the testator for the use of the plaintiff, and on which he has charged an interest from the times he states the sums to have been respectively received by the testator; and therefore, that the plaintiff had elected to consider the whole of the 40,000 livres as money due to him from his father, from the respective times he received it; and that the plaintiff did, on the 9th day of June 1803, file the following account in this cause, as specifying the claims

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which he had against the defendant as executor of the testator, for which he had brought his suit, to wit:

"*Benjamin De Sobry*, Executor of *Michael A. Terrier de Laistre*, deceased,

To *Lewis A. Terrier de Laistre*, Dr.

	Currency.			Dolls.	
1792, Decr. 29. To 1236 livres, money of the Islands, being the price of 4 slaves sold and delivered to the testator on my departure from Martinico to France, as by his written acknowledgment, dated 30th Nov. 1795, equal to	£561	16	4	$1498	18
Interest thereon from this day till 21st May 1803, at 5 p. ct.	291	15	10	778	13
1793, May 21. To 12,000 livres tournois, received by said testator this day for my use, as per his letter of this date, equal to	857	5	0	2285	75
Interest thereon from this day till 20th May 1803, at 5 p. ct.	428	12	6	1142	87
Aug. 1. To 28,000 livres tournois, received by said testator for my use this day, as per his letter of this date, equal to	2000			5333	33
Interest thereon at 5 p. ct till 20th May 1803,	980	9	8	2614	64
1795, May 22. To 3440 livres tournois, received by said testator this day for my use, as per his two letters, one of this date, and the other of the 15th October 1795, equal to	245	14	3	655	23
Interest thereon at 6 p. ct. till 20th May 1803,	117	18		314	40
	£5483	11	7	$14622	52

The defendant then offered in evidence, that in consequence of this account so filed, the defendant had taken out the three last commissions which were executed, in order to examine into the justice of the claims in the account stated, and the operation of the *French* laws thereon; and he gave in evidence the commissions, the returns thereof, and the evidence obtained thereon, and prayed that the court would not permit the plaintiff to change the nature of his claim contrary to his own election deliberately made,

and contrary to his claims as exhibited by him to the defendant in his said account. The plaintiff also prayed the court, and their direction to the jury, that if the jury should be of opinion, from the evidence before them, that 34,925 livres and 14 sols, were, on or before the 29th of December 1793, received in *France* from the plaintiff, and to his use, by the testator, and were, on or about that day, invested by him in merchandises at *Bourdeaux*, in *France*, for the account and risk of the plaintiff; and that the merchandises were then and there, by the testator, shipped to the *U. S.* for the account and risk of the plaintiff, and that the merchandise did arrive in the *U. S.* some time in or before the month of May 1795, and were then and there received by the testator into his possession, and sold and disposed of for his own use and benefit, and the price thereof paid to the testator in his life-time, then the plaintiff is entitled to recover the amount of money which the jury, from the evidence, shall believe that the testator received for the merchandise.

Chase, Ch. J. The court cannot give the direction to the jury as prayed by the plaintiff. The court are of opinion, that the plaintiff is precluded, by his account filed, from going into evidence to establish his claim for the money had and received by the testator for his use, in a manner different from that in which he has elected, by his account, containing a notice of his claim, to consider the testator his debtor for his use. The plaintiff excepted.

9. *The fourth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that if the sum remaining in the defendant's hands, and retained by him as a legacy, or any part thereof, is liable to be recovered from him, as a part of the succession of the testator, and to be made answerable for such debts of the testator as were contracted under the *French* laws, which have their force and effect according to the provisions of those laws, and which are to be paid out of the succession, according to the rules and regulations thereby established, the suit could only be prosecuted against him by and in the name of the plaintiff and his brother, if they have both jointly taken upon themselves the management and administration of the succession, or in the name of his brother, *Marc Anthony*, alone, if he has alone taken upon

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himself the administration and management, and not in the name of the plaintiff alone, as the suit is now brought.

Chase, Ch. J. The court are of opinion, that any creditor may sue the executor *pro forma*, as he is called here, provided he shows himself to be a creditor under the laws of the country where the contract was entered into. That as long as assets remain in the hands of the executor *pro forma*, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, there to be distributed according to the laws of succession of the country where the person is domiciled.

The court are of opinion, that personal property adheres to the person; that wherever the person is domiciled, the property goes in distribution, according to the laws of that country. Whatever fund in this country is answerable for debts, is answerable to all creditors alike, (provided they show themselves to be creditors,) according to the laws of this country.

If our laws give a preference to our citizens, the defendant should have pleaded that our citizens had that preference.

The plaintiff is to be considered as a creditor, and in no other capacity; and if he has not intermeddled, so as to prevent his recovery as such under the *French* laws, he must recover in this action.

The court are of opinion, that if the jury should find, from the evidence, that the plaintiff, as heir pure and simple, or as beneficiary heir, has not intermeddled with the estate or succession of the testator, and that the testator was indebted to the plaintiff, at the time of his death, that then the plaintiff has a right to support this suit. But the court do not mean to decide, that an intermeddling by the plaintiff in the quality of heir pure and simple, or as heir with benefit of inventory, would defeat his right of recovery in this action, that question being still open.

The court are of opinion, that the assets in the hands of the defendant, as executor of the testator, are liable to the payment of debts due to the citizens of *France* from the testator, contracted there, or in the colonies of *France*, and that the defendant will be only accountable to the testamentary executor, the heir pure and simple, or heir with benefit of inventory, for the surplus remaining, after

payment of debts, which surplus is distributable according to the laws of *France*. The defendant excepted.

10. *The fifth bill of exceptions.* The defendant further offered in evidence, that the testator being a *French* citizen, and having his domicil in the Island of *Martinique*, died there, having first duly made the wills and codicils herein before mentioned and set forth, and that at the time of his death he was possessed of certain property in the *U. S.* and had certain debts due to him therein; that *Pechier*, in that Island, as testamentary executor, took upon himself the management and administration of the succession of the testator, according to the *French* laws; that the succession, according to the laws of *France*, is the whole mass of his estate, real, personal, mixed, rights and claims, whatsoever and wheresoever, of which the deceased was seized or possessed, or to which he had right or title at the time of his death, and which, by the *French* laws, were answerable in the first place for payment of debts, and then of legacies, and after the payment of debts and legacies, the residue to be enjoyed by the heir of the deceased, if he had only one child, or if more than one, to be divided equally between them. That by the said law all the children constitute but one heir, and are equally entitled to the residue, where there is a residue. That *Pechier*, by taking upon himself the management and administration of the succession, was the person whose duty it was to take into his possession, and to collect, receive and obtain, the whole of the succession, and to pay and satisfy thereout all debts due from and claims against the succession; and afterwards to deliver over the residue to the heirs of the testator, unless the heirs, or some one of them, chose to take the administration and management of the succession out of the hands of *Pechier*. That by the *French* laws the heir or heirs, or either of them, have an exclusive right, in the first instance, to take upon themselves the management and administration of the succession, and if they do not, and the testamentary executor acts, yet they may, whenever they please, interpose and take upon themselves the management and administration of the succession. That the testator left two sons, his heirs, both of whom are now living, the plaintiff, and his brother named *Marc Anthony Terrier de Laistre*, and that they, sometime in the

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month of July in the year 1798, did take upon themselves; in the Island of *Martinique*, the management and administration of the succession: and that *Pechier* did then and there deliver up to them the succession as far as it had come to his hands; and thereupon it became the duty of the plaintiff, and his brother, to take into their possession the whole of the succession, and collect and obtain the debts, &c. constituting part of the same, and thereout to pay all debts and legacies. That the debts and claims for which this action is brought, were contracted and arose in the government of *France*, and are subject to the operation of the *French* laws, and payable out of the succession according to those laws, and in such manner as is by those laws provided. That he, the defendant, according to the wills and codicils, and with the assent of *Pechier*, while he had the management and administration of the succession, obtained letters of administration in due form of law, in this state, to collect the debts and other effects, which were in the *U. S.* and which constituted part of the succession, in order to pay thereout the debts by the will charged thereon, and to hold the residue agreeable to the dispositions of the testator, and the *French* laws operating thereon. That the sum remaining in his hands, after payment of the debts, is retained by him, he claiming the same as a legacy given him by the testator. That no creditor of the succession, or other person, can, by the *French* laws, bring suit against, or have any claim against a legatee, who hath obtained his legacy for which he can prosecute any suit, unless the succession is insolvent, and that the insolvency must be established by judiciary proceedings in a *French* court, of competent jurisdiction; and that there was no evidence given by the plaintiff of such proceedings having been had. The plaintiff further offered in evidence, that by the laws of *France*, and her colonies, a co-heir of a person deceased, with benefit of inventory, who is also a creditor of the deceased, preserves in all cases his rights as a creditor, and may recover his debt out of the estate of the deceased wherever he can find it, without prejudice to his rights as a co-heir; and that the plaintiff in this action never did act as co-heir of the estate of the testator, nor in any manner intermeddle with his estate. The plaintiff then, upon the whole statement in this case, prayed the opinion of the court, and their di-

rection to the jury, that if the jury should be of opinion, from the evidence before them, that the testator did purchase from the plaintiff, in the Island of *Martinique*, sometime in or before the year 1793, four slaves, the property of the plaintiff, and did also receive from the plaintiff, on loan, at *Bourdeaux*, in *France*, on or about the 21st of May 1793, the sum of 12,000 livres, current money of *France*, and on or about the 1st of August 1793, the further sum of 28,000 livres like money, and on or about the 22d of May 1795, the sum of $170 current money of the *U. S.* to be employed for the benefit of the testator, and accounted for with, or repaid to the plaintiff; and that the testator, at the time of his death, was possessed of personal property in this state, and elsewhere within the *U. S.* to the amount of $13,092 68, and bequeathed the same to the defendant by his will, bearing date at *Martinique*, on the 14th of April 1797; and that the defendant duly proved the said will in the orphans court of *Baltimore* county, in this state, and obtained from that court letters testamentary on the will, and took upon himself the burden and execution thereof, and received into his possession, as executor, the personal property of the testator, then the plaintiff is entitled to recover, as well the value of the slaves, as the several sums of money received by the testator, provided there be assets sufficient to pay the same, and if not, then so *pro rata*.

Harper and *Boyd*, for the Plaintiff, cited *The Dutch West India Company vs. Van Moses*, 1 *Stra.* 612. 2 *Huberus*, B. 1, tit. 3 p. 26, cited in *Emory vs Greenough*, 3 *Dall. Rep.* 370, *(note.)* *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 142. *Robison vs. Bland*, 2 *Burr.* 1077, 1078, 1083. *Imlay vs. Ellefsen*, 2 *East*, 455. *Negro Hector vs. De Kerlegand*, 3 *Harr. & M'Hen.* 185. *Wright vs. Nutt*, 1 *H. Blk. Rep.* 152. *Folliott vs. Ogden*, *Ibid* 123. S. C. 3 *T. R.* 734. 3 *Bac. Ab.* 30. *Hunter vs. Potts*, 4 *T. R.* 182, 183, 184, 185. *Pigott vs. Mason*, in Court of Chan. *Sinclair vs. Monsieur de France*, 2 *Bos. & Pull.* 364, *(note.)* *Mostyn vs. Fabrigas*, 1 *Cowp.* 174. *Dixon's Ex'rs. vs. Ramsay's Ex'rs.* 3 *Cranch*, 324. *Talleyrand vs. Boulanger*, 3 *Ves.* 448. *Thorn vs. Watkins*, 2 *Ves.* 36. 2 *Fonbl.* 442; and *Domat*, 349.

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Martin, (Attorney General,) for the Defendant, cited *Harper vs. Hampton*, 1 *Harr. & Johns.* 453. 2 *Huberus*, B. 1, tit. 3, *p.* 36. *Cumming vs. The State*, 1 *Harr. & Johns.* 340. *Melan vs. The Duke of Fitzjames*, 1 *Bos. & Pull.* 142. *Talleyrand vs. Boumlanger*, 3 *Ves.* 444; and *Vatell*, B. 2, *ch.* 8, *s.* 110, 111.

Chase, Ch. J. delivered the opinion of the court. The court are of opinion, that it is a general principle, which admits of a few exceptions, that in construing contracts made in foreign countries, the courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired, and the obligations created by it. That the remedy or mode of enforcing the contract, is to be conformable to the laws of the country where the action is instituted. *Dixon's ex'rs. vs. Ramsay's ex'rs.* 3 *Cranch*, 323, 324.

The exceptions to construing contracts according to the *lex loci*, which at present occur, are

First. Where by the terms of the contract it is to be executed in another country: there the parties to it, by common consent, adopt the laws of that country as the rule of decision.

Secondly. Where the contract is *contra bonos mores*, as for the price of prostitution—Such a contract, though legal in some countries, would not be enforced in *England*, or in this state.

The court are also of opinion, that unless the jury should be satisfied, according to the laws of *France*, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, that then the plaintiff is entitled to recover whatever the jury may find due on the contracts made in *France*, *according to the laws of France.*

The court are also of opinion, that as to that part of the sum which is claimed under the contract made in *America*, the plaintiff is entitled to recover, without any regard to the laws of *France*, whatever the jury may find due thereby.

The court are also of opinion, that upon principles of common sense and justice, no part of the testator's estate is subject to distribution among his co-heirs, but the surplus or residuum which may remain after payment of all

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the debts and legacies; and that a debt due to one of the co-heirs is as much entitled, on principles of justice, to payment, as a debt due to a stranger; and that it is incumbent on the defendant to prove to the jury that there is a law of *France* which extinguishes the right or claim of the co-heir creditor, with benefit of inventory, unless he renounces as co-heir.

(a) The court are also of opinion, that the laws of *France* are matters of fact to be found by the jury, upon evidence to be produced to them; and, unless the jury find some law of *France*, which extinguishes the claim or right of recovery of the plaintiff, that the plaintiff has a right to recover in this case, whatever the jury may find to be due to him upon a full investigation of the evidence. The court also inform the jury, that it does not appear to the court that there is any law of *France* which is a legal impediment to the the plaintiff's recovery. The defendant excepted.

Harper, for the Plaintiff, before the jury, upon the laws of *France*, cited 1 *Domat*, 346, 347, 348, 349; & 2 *Coutume de Paris*, 252, 299, 302.

Martin, (Attorney General,) and *Purviance*, for the Defendant, also before the jury, referred to the testimony taken under the several commissions issued in this cause. 2 *Pothier*, 116. 1 *Poth.* 77. 2 *Coutume de Paris*, art. 300, 301, 252, 302, 303, 304, 307, 309, 317, 318, 344, and the commentary of *Ferriere* on those articles. *Serres*, 304, 305, 400, 311, 312, 363, 309, 351, 393, 421, 315, 322, 323, 314, 308, 262. *Ordinance of Lewis* XIV, art. 1, 4. 1 *Coutume de Paris*, art. 179. 13 *Vin. Ab.* 50, 414. *Peake's Evid.* 48; and *Collet vs. Keath*, 2 *East*, 260.

Verdict and judgment for the plaintiff, and the defendant brought a writ of error to this court.

The cause was argued before TILGHMAN, BUCHANAN, NICHOLSON and GANTT, J. by

Winder, for the plaintiff in error, and by

Harper and *Boyd*, for the defendant in error.

(a) This part of the court's opinion was given by them after the argument of all the points of law in the cause, and while the attorney general was addressing the jury.

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THE COURT concurred in the opinions of the General Court, in the *first*, *fourth*, and *fifth* bills of exceptions, taken by the defendant in that court.

JUDGMENT AFFIRMED.

DECEMBER.

HOLLINGSWORTH, *et ux.* *vs.* M'DONALD, *et al.*

The *habendum* of a conveyance in trust, after vesting a life-estate in R P, uses the following expressions: "And from and after her decease, that T P, and his heirs, forever, shall have and possess the said land and premises; and in case of his, the said T P's death, without lawful issue, the said lands shall revert to, and be vested in, the said R *P*, and her heirs, for ever"—*Held*, that T P took a fee tail, with a reversion in fee to R P.

In a conveyance of a freehold or legal estate, technical words are appropriated by law to the creation, or limitation of particular estates; for instance, to create an estate in fee the limitation must be to J S, and his heirs, and to create a fee tail, to J S, and the heirs of his body. The words *de corpore suo*, are indispensably necessary, but may be supplied by words to the same effect, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend.

Whether the court can, and how far they are at liberty, in expounding a deed of conveyance, creating or limiting a use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law, in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties as in a will?

Whether a trust estate, or any but a legal estate can pass by a deed of bargain and sale?

Whether a *feme covert* can pass her real estate in any other way than by a deed of bargain and sale?

Whether a trust estate is answerable to the creditors of *cestuy que trust*?

A *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery or deed executed and acknowledged according to the mode prescribed by the act of 1715, *ch.* 47.

The acknowledgment of a deed by a *feme covert* grantor, held to be defective, the word "*fear*" being omitted in the certificate of the acknowledgment, and no word of similar import or meaning substituted in its place; but held to be cured by the act of 1807, *ch.* 52.

A court of law cannot, in the form of such a certificate as not expressly required, and the omission of words declared essential can be supplied by the substitution of words equipollent, or of similar import and signification.

A decree of the chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review.

A bill of review lies after the decree is signed and enrolled.

A bill in the nature of a bill of review lies after the decree is made, but before enrolment.

A decree must be considered as enrolled after it is signed by the chancellor and filed by the registrar.

A bill of review cannot be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter, and the existence of it at the time of the decree, to lay a foundation for answering the allegation for the leave to file a bill of review, and obtaining such leave.

On petition suggesting [illegible] matter [illegible] by affidavit as the ground for filing a bill of review, the chancellor [illegible] his judgment upon the propriety of interfering or meddling with his decree for the cause discovered, and grants or refuses an appeal accordingly.

As to the distinction between trusts executed and executory.

APPEAL from a decree of the court of chancery *dismissing* the bill of complaint. The material facts were these —The complainant *Rachel*, (one of the appellants,) whilst she was sole, on the 21st of September 1790, was seized in fee of the tracts of land called *Rich Neck* and *Howard's Timber Neck*. A marriage settlement took place between the complainants, on the 21st of September 1790, and *Lyde Goodwin* was appointed trustee. This settlement was as follows: "This indenture, made the 21st of September 1790, between *Jesse Hollingsworth*, of the first part, *Rachel Lyde Parkin*, of the second part, and *Lyde Goodwin*, of the third part;" and after reciting the intended marriage between the said *Jesse* and *Rachel*, stated, that the said *Jesse* granted, &c. to the said *Lyde*, and the said *Rachel*, with the consent and approbation of the said *Jesse*, granted &c. to the said *Lyde*, his heirs and assigns, all those tracts of land called *Rich Neck* and *Howard's Timber Neck*,

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"to have and to hold the said lands," &c. "unto the said *Lyde Goodwin*, his heirs and assigns, for ever. In trust nevertheless, and for the uses," &c. "That she the said *Rachel* shall have, hold, occupy, possess and enjoy, the said lands, with the rents, issues and profits thereof, for and during the natural life of the said *Rachel*, and the same convert and apply to her separate use and benefit, without any let, trouble or impediment, from the said *Jesse*, in as full and ample manner, to all intents and purposes, as if she the said *Rachel* had remained a *feme sole*, and unmarried; and from and after her decease, that *Thomas Parkin*, and his heirs, for ever, shall have and possess the said lands and premises; and in case of his the said *Thomas's* death, without lawful issue, the said lands and premises shall revert to, and be vested in, the said *Rachel*, and her heirs, for ever," &c. The marriage took effect, and on the 4th of January 1796 the complainants, together with *Lyde Goodwin*, executed a deed to *Thomas Parkin*, the son of the female complainant by a former marriage, which purports to convey to him an estate in fee simple in the said lands, and was acknowledged as follows: "*Baltimore* county, sct. On this 15th day of February 1796, personally appeared *Jesse Hollingsworth* and *Lyde Goodwin* before us the subscribers, two justices of the peace for *Baltimore* county, and severally acknowledged the aforegoing instrument of writing to be their act and deed, according to the true intent and meaning thereof. At the same time came *Rachel*, the wife of the said *Jesse Hollingsworth*, and being by us privately examined apart from and out of the presence and hearing of her said husband, did acknowledge the aforegoing instrument of writing to be her act and deed, according to the intent and meaning thereof, and declared that she made and executed the same, and this her acknowledgment thereof, voluntarily and of her own free will and accord, without being induced thereto by threats of or ill usage from her said husband, or through fear of his displeasure." This acknowledgment was signed by the justices. *Parkin*, the grantee, died in possession of the lands in 1797, of full age, and by his will devised the same in fee to his mother, one of the complainants. Certain creditors of *Parkin* and *M'Kenna* filed a bill in the court of chancery against the complainants, under the devise to the mother as devisee of *Parkin*, or as his heir at law, stating that

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Parkin died seized in fee of the lands; that they were his creditors; that *Parkin* and *M'Kenna* were insolvent, and praying a sale of the land. The complainants answered the bill, admitting *Parkin* to be seized in fee of the lands, and that he devised the same to his mother, one of the complainants. A decree for a sale took place; *S. Chase*, junior, was appointed trustee for making the sale, who made a sale of part of the lands, and made a report thereof to the chancellor; which was confirmed, by the consent of the complainants. After the sale was made, and the confirmation thereof, the complainants alleged, they had discovered that *Parkin* never was seized of the lands in fee, but that the estate in fee belonged to the complainant, *Rachel*; and that the deed from the complainants to *Parkin*, was not such a deed as passed the estate of a married woman. The *prayer* of the bill was, that the chancellor would decree the sales of the lands to be null and void, &c. and for general relief, &c.

Hanson, Chancellor, (October term 1805,) *decreed*, that the bill be dismissed, &c. From this decree the complainants appealed to this court.

The cause was argued at December term 1806, before Chase, Ch. J. Tilghman, Buchanan, Nicholson and Gantt, J.

Key, for the Appellants, contended, 1. That the deed of the 21st of September 1790, being a marriage settlement, vested the fee of the lands in *Goodwin*, as trustee, for the sole and separate use of Mrs. *Hollingsworth*, *for life*, of the rents, issues and profits thereof. 2. In trust for *Parkin*, an estate tail. 3. In trust of the remainder in fee to Mrs. *Hollingsworth*, and her heirs. 4. That no power of disposition is given by the trust deed of the lands therein mentioned. 5. That the deed of the 4th of January 1796, does not pass any estate or interest from Mrs. *Hollingsworth*. 6. That an equitable estate can no more be conveyed by a *feme covert*, unless the law is complied with, than a legal estate can, if there is no power given in the trust deed pointing out a different mode. 7. That no act done by Mrs. *Hollingsworth* does divest her estate in the lands.

On the *first*, *second*, *third*, and *fourth points*, he insisted, that the trusts created by the deed of 1790, were not

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executed by the statute, and that where they were not, the terms of the trust must be governed by the intention of the grantor. That the legal effect and import, and the particular meaning and operation of that deed, created an estate tail in *Parkin*, and the lands were not answerable for his debts. To show that the words in the *habendum* of the deed created an estate tail, he cited 2 *Roll. Ab.* tit. *Grant*, 65, pl. 25. *Ibid.* 68, pl. 28. *Co. Litt.* 21, a; and *Shep. T.* 52, 75, 103, 113.

On the *fifth point*, he referred to the act of 1715, *ch.* 47. *Webster's Lessee vs. Hall*, 2 *Harr. & M'Henry*, 19. *Flanagan's Lessee vs. Young*, *Ibid* 38. *Lewis's Lessee vs. Waters*, 3 *Harr. & M'Hen.* 430. *Jacob's Lessee vs. Kraner*, 1 *Harr. & Johns.* 291. *Peddicoart's Lessee vs. Riggs*, *Ibid* 293. *Hawkins's Lessee vs. Burress*, *Ibid* 513. *The Corporation, &c. vs. Hammond*, *Ibid* 580. *Heath's Lessee vs. Eden*, *Ibid* 751; and *Greene vs. Muse & Ennalls's Lessee*, *(ante* 62.*)*

On the *sixth point*, he cited *Shep. T.* 507. *Gilb. L. of Uses*, 1, 2, 244. *Watts vs. Ball*, 1 *P. Wms.* 109. 2 *Blk. Com.* 337. *Banks vs. Sutton*, 2 *P. Wms.* 713. *North vs. Champernoon.* 2 *Chan. Ca.* 78; and *Calvert's Lessee vs. Eden*, 2 *Harr. & M'Hen.* 336.

Harper, for the Appellee, contended, 1. That this was substantially a bill of review, on the ground of new matter discovered, and must be so considered; and in this view of the bill, it is liable to four objections—1st. It is not in *time*. 2d. It is without affidavit or leave. *Mitf.* 34. 3d. It is not for *newly* discovered matter. *Chan. Pr.* tit. *Bill of Review. Mitf.* 34. And 4th. If this could be considered as newly discovered matter, it is still not within the rule. It must be matter which the party had previously no means of knowing. *Ibid.*

2. That Mrs. *Hollingsworth's* acknowledgment of the deed of 1796, is sufficient, the act of 1715, *ch.* 47, not prescribing a *formula* which must be strictly pursued. *Webster's Lessee vs. Hall*, 2 *Harr. & M'Hen.* 19. *Pattison's Lessee vs. Chew*, 1 *Harr. & Johns.* 587, *(note.) Gittings's Lessee vs. Hall*, in this court, on appeal.

3. That *Parkin*, under the deed of 1790, had a remainder in fee simple, and not in tail; and that such a limitation, applied in a deed to a legal estate, either at common law, or by way of use, would give a fee simple,

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he cited 3 *Blk. Com.* 107. *Litt. Sect.* 31. *Co. Litt.* 21, 27, b. *Abraham vs. Twigg*, *Cro. Eliz.* 478. *Idle vs. Cooke*, 2 *Ld. Raym.* 1146. 1 *Roll. Ab.* 838. *Paramour vs. Yardly*, *Plow.* 541. *Litt.* 258. *Turnman vs. Cooper*, *Cro. Ja.* 476. *Leigh vs. Brace*, *Carth.* 343. S. C. 5 *Mod.* 266. S. C. 1 *Ld. Raym.* 101. S. C. 3 *Salk.* 337. That trust estates are governed in their creation, limitation and extent, by all the same rules of construction, which apply to legal estates, he cited 2 *Blk. Com.* 337. *Shep. T.* 507. *Duke of Norfolk's* case, 3 *Chan. Ca.* 48. *Philips vs. Philips*, 1 *P. Wms.* 35. *Watts vs. Ball*, *Ibid* 109. *Banks vs. Sutton*, 2 *P. Wms.* 713. *Jones vs. Morgan*, 1 *Bro. Chan. Ca.* 222. *Philips vs. Bridges*, 3 *Ves. jr.* 127. *Bagshaw vs. Spencer*, 2 *Atk.* 578. *Garth vs. Baldwin*, 2 *Ves.* 646. 2 *Fonbl.* 16. 1 *Fearne*, 166, 170. *Glenorchy vs. Bosville*, *Ca. temp. Finch*, 3. *Ward vs. Bradley*, 2 *Vern*, 23. *Peacock vs. Spooner*, *Ibid* 195. *Dafforne vs. Goodman*, *Ibid* 363. *Webb vs. Webb*, 1 *P. Wms.* 132. *Theebridge vs. Kilburne*, 2 *Ves.* 237. 2 *Fearne*, 302. That admitting the acknowledgment to be ineffectual, and *Parkin* to have only an estate tail, with remainder over in fee to his mother, until the interest during her life is at end, the estate is liable for *Parkin's* debts; and that this application, if free from all other objections, is premature. He cited Lord *Hardwicke's* observations in *Pawlet vs. Delaval*, 2 *Ves.* 666.

Martin, in reply. 1. As to the question what estate was created by the deed of 1790, he cited *Co. Litt.* 21, a. 1 *Roll. Ab.* 838. *Turnman vs. Cooper*, *Cro. Jac.* 476. *Bamfield vs. Popham*, 1 *P. Wms.* 57, *(n.)* *Perkins*, *sect.* 173. 2. He contended that the court of chancery determines what estate passes under the trusts; and whatever interest that court determines to exist, goes as a legal estate at law. He cited 5 *Bac. Ab.* tit. *Uses & Trusts*, 308, 332, 354, 379, 386. *Gilb. Law of Uses*, 161, 162. 3. As to what is an executed, and what is an executory trust, he cited 2 *Fonbl.* 50, *(note.)* *Ibid* 400, *(note*, q.) 4. As to the legal effect of the deed of 1796, he referred to the act of 1715, *ch.* 47 *Wilson on Fines*, 20. *Nicholson's Lessee vs. Hemsley*, 3 *Harr. & M'Hen.* 409; and *Sunday's* Case, 9 *Coke*, 127. 5. That if a *feme covert* holds a separate estate under a marriage settlement, she cannot

convey in any other mode than that prescribed by law, where there is none pointed out in the marriage settlement. He cited 2 *Bac. Ab.* tit. *Curtesy*. *Hearle vs. Greenbank*, 3 *Atk.* 695. S. C. 1 *Ves.* 298. *Roberts vs. Dixwell*, 1 *Atk.* 607. 6. Whether the appellants have a right to bring the present bill, if considered as a bill of review upon discovery of new facts, or as an original bill, he cited *Mitf.* 35, 74. 1 *Harr. Chan. Pr.* 306. *Hind's Pr.* 38. *Anonymous*, 3 *Atk.* 17. *Norris vs. Le Neve*, *Ibid* 26, 35, 38.

Curia adv. vult.

At the present term the opinion of the court was delivered by

Chase, Ch. J. In this case, the first question to be decided by the court is, what estate vested in *Thomas Parkin*, in the land in question, under and in virtue of the deed from *Jesse Hollingsworth*, and *Rachel Lyde Parkin*, to *Lyde Goodwin*, executed on the 21st of September 1790?

The question aries on the following words in the *habendum* of the deed: "And from and after her decease, that *Thomas Parkin*, and *his heirs*, *for ever*, shall have and possess the said lands and premises; and in case of his the said *Thomas's death without lawful issue*, the said lands shall revert to and be vested in the said *Rachel*, and her heirs, for ever."

It is admitted that *Lyde Goodwin*, under this deed, took a fee simple in the lands in question, in trust for *Rachel Parkin*, during her life, and that the words before recited, would in a will create an estate tail in *Thomas Parkin;* but it is objected that those words in a deed will not create an estate tail, and that a fee simple passed to *Thomas Parkin*.

It is without doubt that the above words in a will would give a fee tail, because no technical words being necessary to create such estate. The intention expressed by the words of the testator must prevail if not inconsistent with some rule or principle of law; and the intention is plain here that *Thomas Parkin* was to take a fee tail.

In a deed or conveyance of a frechold or legal estate, technical words are appropriated by law to the creation or limitation of particular estates; for instance, to create an estate in fee, the limitation must be to *J. S.* and his heirs, and to create a fee tail, to *J. S.* and the heirs of his body.

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It is established that the words *de corpore suo* are not indispensably necessary, but may be supplied by words equipollent or tantamount, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend.

In this case the limitation is to *Thomas Parkin*, and his heirs, and in case of his death without lawful issue, to revert to *Rachel Parkin*, and her heirs. These words are comprehended in one sentence, and contain the two requisites necessary to constitute an estate tail. The subsequent words, "in case of his death without lawful issue," qualify and restrain the generality of the precedent expressions, (to *Thomas Parkin*, and his heirs,) and point out, unequivocally and plainly, the heirs intended to inherit, and confine them to heirs of his body. *Thomas Parkin* could not die without heirs, as long as he had lawful issue; and in this case the words lawful issue, heirs of his body, and issue of his body, as words of limitation, expressive of the quality of the estate to be granted, are of the same import and signification, and necessarily designate the heirs intended to inherit, and do convert the fee simple created by the first words, into a fee tail; for *Thomas Parkin* could not have issue, or lawful issue, but of his body.

The court being of opinion, that an estate tail vested in *Thomas Parkin*, with the reversion in fee to *Rachel Lyde Parkin*, under the deed; and being also of opinion, that the said words, in a conveyance of a freehold estate, would create a fee tail, it becomes unnecessary to decide the question, so ably and learnedly discussed by the counsel, how far the court is at liberty, in expounding a deed of conveyance creating or limiting an use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law, in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties, as in a will.

It is also unnecessary to decide on the nice and refined distinctions between trusts executed and executory; and the court give no opinion on those questions.

As to the operation of the deed of 1796. It is unquestionable that a *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery, or deed executed and acknowledged according to the mode

prescribed by the act of 1715; and the question to be decided by the court is, whether the acknowledgment of the deed by Mrs. *Hollingsworth* is conformable to the said mode, and effectual to render the deed operative in law to convey her interest in the lands in dispute to her son *Thomas Parkin*?

The court are of opinion, that the acknowledgment is substantially defective, the word "fear" being omitted in the certificate of the acknowledgment, and no word of similar import or meaning substituted in its place. The word *fear*, in that part of the certificate, means a particular specific kind of fear, and signifies that she makes her acknowledgment without being induced thereto by *fear of ill-usage* by her husband. The true and genuine meaning of the words, "without being induced thereto by fear or threats of, or ill-usage by, her husband," being fear of ill-usage, threats of ill-usage, or actual ill-usage.

The court, in thus giving their opinion, do not decide that a literal adherence to the form of the certificate is essentially requisite, and that the omission of words deemed essential, cannot be supplied by the substitution of words equipollent, or of similar import and signification. But the court are of opinion, that the deed is rendered valid and effectual to pass the land mentioned therein, to *Thomas Parkin*, in fee simple, by the act of assembly, entitled, "An act for quieting possessions, and securing and confirming the estates of purchasers," passed at *November* session 1807, *ch.* 52, it appearing by the certificate of the acknowledgment of *Rachel Hollingsworth*, that she made her acknowledgment privately and willingly, out of the presence and hearing of her husband.

As to the question, whether the present bill can be sustained?

The decree of the chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review.

A bill of review lies after the decree is signed and enrolled.

A bill in the nature of a bill of review lies after the decree is made, but before enrolment.

A decree must be considered as enrolled, after it is signed by the chancellor, and filed by the register.

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A bill of review will only lie for two causes—Error apparent on the decree, or for some matter relevant, existing at the time of the decree, and discovered since. Nothing appears on the proceedings on the first bill to support the position that there is error apparent on the decree, the deeds not being made a part of the proceedings.

It cannot be supported for matter existing at the time of the decree, and discovered since, without affidavit of such matter, and the existence of it at the time of the decree, to lay the foundation for applying to the chancellor, for his leave to file a bill of review, and obtaining such leave.

On petition suggesting such matter, supported by affidavit as the ground for filing a bill of review, the chancellor exercises his judgment on the propriety of interfering or meddling with his decree, for the cause disclosed, and grants or rejects the application accordingly. These requisites, for laying the foundation for the present bill, not having been complied with, the court are of opinion, that the decree of the chancellor, dismissing the bill, be affirmed, with costs to the appellee.

DECREE AFFIRMED.

DECEMBER.

A and B. entered into a bond to C. on which separate suits were brought, and judgments recovered. B pays both judgments, and, as the surety, obtains an assignment of the judgment against A. from the attorney of C. and issues an execution in his own name as assignee of C against A. on the judgment against him, for the whole sum of money recovered. A files a bill in chancery against B. charging that the bond was for a joint debt due from both of them: that he had paid nearly one half of the debt, and that B was liable for the other half—and so, that B was indebted to him in a sum of money recovered by a decree in chancery, which he refused to account. Prayer for general relief, and for an injunction to stay the execution. Injunction granted. B. by his answer, denied that the debt was a joint one: that he was the surety of A to the bond. He admitted the decree obtained, but that he had appealed therefrom, which appeal was depending and undetermined. *Decreed*, that B was a co-principal with A in the bond to C. on the ground that he received, in specifics, as his share of the personal estate of his father, (for whose debt the bond was given,) as a consideration for his becoming a principal in the bond with A——that A be charged with one half of the amount of the bond, with interest, and credited with the payments by him made, and the amount of the decree since finally made in his favour, and he was charged with B's distributive share of his father's estate, with interest. By which a balance was due to in A to B.—*Decreed*, that the injunction be dissolved, and that B be permitted to take out execution against A. on the judgment at law, for the said balance, with interest, &c. And that the execution be sued out in the name of C for the use of B.

NORWOOD *vs.* NORWOOD.

APPEAL from a decree of the Court of Chancery. The bill, filed by the complainant, *Edward Norwood*, (now Appellee,) on the 31st of July 1800, stated, that he and the defendant *Samuel Norwood*, (now Appellant,) being jointly indebted to *D. Dulany*, on the 20th of April 1784, gave to him their joint bond, conditioned for the payment of £314 sterling, and £320 current money, with interest. That the defendant having omitted to pay any part, suits were brought against each on the bond, and judgments obtained. That the complainant paid £100 1 1, current mo-

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ney, on the 17th of September 1788, and $1000 on the 28th May 1795. That the balance due from him on the judgment, after the deduction of the payments, amounted, with interest and costs, on the 29th of July 1800, to £321 5 10. That the defendant, contriving to injure and oppress the complainant, obtained an assignment of the whole judgment against the complainant, and issued an execution thereon in his own name, as assignee, and threatens to levy the whole amount of the judgment, although the defendant is himself liable for one half. That the defendant is indebted to the complainant in £776 15 6 current money, exclusive of interest and costs, recovered by the latter of the former by a decree of the court of chancery. That the defendant refuses to discount out of the judgment any part of the money due to the complainant. *Prayer* for general relief, and an injunction. Injunction granted, &c. The *answer* of the defendant stated, that on the 20th of April 1784, at the pressing solicitation of the complainant, he became his security to *D. Dulany*, in the bond stated in the bill, and which bond was given to renew a former bond of the complainant to *Dulany*, for the sole and proper debt of the complainant, contracted about the year 1772. That the defendant neither directly nor indirectly received or participated in the benefit of any part of the consideration of the said debt, and that he signed and executed the bond as the security of the complainant, and he positively denies the allegation of the complainant, that the same was for a joint debt, or that the defendant ever received full or any satisfaction for the same. He admits the payments stated by the complainant, and the institution of the suits, and recovery of judgments on the bond, and that he the defendant hath obtained, as the surety of the complainant, an assignment of the judgment recovered against the complainant, as was lawful and just for him to do, and he claims and insists, that he, as surety of the complainant, hath a legal, just, and equitable title, to proceed to recover the balance thereon due. He admits that the complainant hath obtained a decree in the court of chancery against him for the sum stated, but he insists that the complainant cannot justly claim any discount for or by reason of that decree, which is unjust, and upon which he hath prosecuted an appeal to the court of appeals, and where he confidently expects a reversal of the decree. He denies all fraud, &c.

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The defendant gave notice of a motion to dissolve the injunction at the next term.

Hanson, Chancellor, at the next term, on the motion to dissolve, passed an order continuing the injunction.

There was much testimony taken, and it was the object of the complainant to prove that he had paid to the defendant more than his proportion of his father's estate, whose executor the complainant was, and that the debt due to *Dulany* was from the estate of the father; and that the bond was executed by them as joint obligors, each to pay one half. The judgments obtained by the executrix of *Dulany* against *E.* and *S. Norwood*, (the payments made being deducted,) in consideration of the principal sum of money, and interest due thereon, being paid by *S. Norwood*, all the right, &c. of the plaintiff to the judgments, was assigned unto *S. Norwood* on the 24th of July 1800, by *William Cooke*, Esquire, attorney for the executrix of *Dulany*: and in virtue of that assignment, a writ of *fieri facias* issued on the judgment against *E. Norwood*, in the name of *S. Norwood*, as the assignee of the executrix of *Dulany*, returnable to the general court at October term 1800.

Hanson, Chancellor, (June term 1803,) passed the following interlocutory decree: The case is that of one of two obligors in a bond obtaining an assignment of the judgment on the bond, and endeavouring to avail himself of it as a mere security; whether or not he was such, is the main, if not the only question in dispute. As it does not appear from the face of the bond that the assignee was only a security, his answer to the bill is not to be considered as standing good if it be contrary to the testimony of at least two witnesses, or of one witness, and strong equitable circumstances. Whether or not he was a mere surety must then be determined from the testimony.

The chancellor must declare that the testimony is by no means such as to convince him that *S. Norwood* joined in the bond with *E. Norwood* as a mere security. But supposing he did, and that no part of the consideration was by him received from *Dulany*, the obligee, if he received a consideration from *E. Norwood* for joining in the bond, he is surely to be charged with it.

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Upon the whole, the chancellor conceives himself obliged to decree; and it is, &c. decreed, that the parties account with each other before the auditor; and that the auditor of this court state and return the account to this court, charging *E. Norwood* with one half of the bond to *Dulany*, in the bill and answer mentioned, and giving him credits for payments appearing to have been by him made, charging interest on the principles in this court established, and striking the balance.

But still the chancellor is by no means satisfied with respect to the merits of the cause. It appears that *S. Norwood* received upwards of £269 in specifics, as his share of the personal estate of the father, when a far less sum was due to him; and it is probable that the said sum was the consideration for his joining *E. Norwood* in the bond to *Dulany*. The case is wonderfully perplexed and confused, probably from the want of keeping regular accounts. If that sum *was* the consideration, and if, after deducting *S. Norwood's* share of the personal estate, it was inferior to the one half of the bond to *Dulany*, surely *S. Norwood* is entitled to credit for the deficiency. Let then the auditor state an account in a different way, charging *E. Norwood* with the whole of the bond to *Dulany*, giving him credit for payments, and likewise for the delivery of the specifics to *S. Norwood*, deducting *S. Norwood's* share of the personal estate. The account, when returned, shall be subject to the opinion of the chancellor, on exceptions, &c.

The truth is, that in the present state of affairs the chancellor does not feel himself competent to pass a final decree to satisfy himself. He knows not whether in the account in another cause between the parties, *E. Norwood* hath not had credit for the said sum. Let the auditor examine the former account. If already *E. Norwood* has received a credit for the said sum, probably he ought to be charged with the whole of the bond to *Dulany*. However, the whole is open to examination and controversy.

The Auditor having reported, and both parties having excepted to some one of the accounts stated,

Hanson, Chancellor, (July 25, 1804.) After hearing the exceptions of the parties, and the ingenious arguments of counsel relative to the statements of the auditor made under the decree of the 3d of August last, the chancellor

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has bestowed the most anxious attention to, and has long deliberated on a cause, than which he never attended to one more perplexed and difficult. The testimony is very far from being satisfactory, and yet it appears unquestionably entitled to some weight.

Upon the whole, the chancellor conceives it best to consider the complainant as the sole principal in the bond to *Dulany*, (the evidence in the cause showing that it was given on account of bonds by him passed without the defendant,) and to charge the defendant with £269 6 4, twelve months after the day of the date of the probate of the last will of *E. Norwood*, deceased. It is accordingly ordered, that the auditor state another account differing substantially from account No. 2, by him endorsed and filed, &c.

And, on the 27th July 1804, it was further decreed, that the *injunction* should be dissolved, provided that no more be considered due or levied by *S. Norwood*, by his execution on the judgment at law assigned to him, than the costs at law, and the sum of £278 9 0, with interest, &c. But whereas *E. Norwood*, by his petition this day, hath stated on oath, what is true to the chancellor's knowledge, that he hath a decree against *S. Norwood* for a sum which, with the lawful interest, is superior to the aggregate sum of £303 11 6, due to *S. Norwood* from *E. Norwood*, it is, conformably to the petition, adjudged, &c. that *S. Norwood* be further enjoined not to proceed on his execution at law until the further order of the chancellor, it being reasonable that there be a discount between the parties. From which decree the defendant appealed to this court.

The cause was argued before Chase, Ch. J. Tilghman, Buchanan, Nicholson, and Gantt, J.

Johnson, (Attorney General,) *T. Buchanan*, and *Harper*, for the Appellant, contended, that the complainant was tied up to the relief prayed for in his bill, and that the general prayer for relief related only to that asked on the facts disclosed in the bill. That the *allegata* and *probata* must agree. That a discount of the amount of the decree obtained by the complainant against the defendant, ought not to have been allowed by the chancellor, as it was not claimed as a ground of relief by the bill. That there was no allegation in the bill, of the informality of the assignment to the defendant of *Dulany's* judgment,

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and the defendant's right to claim under it was not denied by the bill.

Key, for the Appellee, contended, 1. That the appellant had no legal assignment of *Dulany's* judgment against the appellee, to enable him to issue execution thereon in *his own name*. 2. That the appellant was a joint principal with the appellee, in the bond to *Dulany*, for a valuable consideration paid to him; and being a joint principal, was not entitled to an assignment of the judgment against the appellee, so as to issue execution thereon. 3. That the amount of the decree by the chancellor, as well as the other sums, supposing the appellant not a co-principal, are properly discountable with any other sums he might owe to the appellee. He referred to the act of 1763, *ch.* 23, and insisted that the appellant must prove, 1st, That he was a surety; and 2d. That he has a regular and legal assignment. That the assignment was made by the *attorney*, and not by the principal creditor or plaintiff in the judgment, as required by the act of 1763; and that the execution, issued in the name of the appellant, as assignee of the plaintiff, in the judgment, was not justified by the act under an assignment made by the attorney of the plaintiff, and in which it was not stated that the appellant was the surety.

Chase, Ch. J. *(a)*. The court are of opinion, that the decree of the court of chancery be reversed, with costs to the appellant, and that the injunction be dissolved. That the clerk of this court state an account between the parties. The court are of opinion, that the appellant was co-principal and joint debtor in the bond with the appellee to *Dulany*, on the ground that the specifics, to the amount of £269 6 4, were delivered and paid to the appellant by the appellee, as a consideration for the appellant's becoming a principal with the appellee in that bond. Therefore charge the appellee with one half of the bond, &c. &c.

By the statement made, as directed by the court, a balance remained due to the appellant, (after giving the appellee credit for the payments he had made on the judgment, and the amount of the decree by him obtained against the appellant on the 22d of February 1803, and charging him with the appellant's distributive share of his father's

(a) Tilghman and *Gantt*, J, concurred.

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estate, with interest, &c.) of £318 12 5, current money. The court therefore *decreed*, that the appellant be permitted to take out execution against the appellee on the judgment, &c. for the sum of £318 12 5, current money, with interest from the 19th of January 1803, and the costs at law; and that the execution be sued out in the name of *Rebecca Dulany*, as executrix of *Daniel*, for the use of the appellant.

DECREE REVERSED, &c.

JUNE, (E. S.)

GUNBY *vs.* SELBY.

In an action of debt upon a guardian's bond, dated in 1797, the plaintiff proved by a witness, that land of the plaintiff was during his minority, rented by the guardian to the witness, in 1791, and that the rent was afterwards lessened, in consequence of an agreement between them, that the witness should take charge of the defendant's stock upon the land — *Held*, that such evidence was inadmissible

APPEAL from *Worcester* county court. Debt on a guardian's bond, dated in 1797. At the trial, the plaintiff, (the appellee,) offered a witness to prove that the lands, the property of the plaintiff, were, during his minority, rented by the defendant, (now appellant,) to the witness, in 1791, and that the rent agreed upon between the witness and defendant was lessened in consequence of an agreement between them, that the witness should take charge of the defendant's stock upon the lands. The defendant objected to the admission of such evidence, as incompetent. But the court, [*Polk*, Ch. J.] was of opinion, that it was proper to be given to the jury, and to examine the witness as to the said facts; and the same was accordingly done. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before TILGHMAN, BUCHANAN, and GANTT, J. by

Whittington and *Wilson*, for the Appellant, and by

J Bayly, for the Appellee.

JUDGMENT REVERSED.

JUNE, (E. S.)

EMORY'S Adm'r. *D. B. N. vs.* THOMPSON'S Ex'x.

A copy of a paper, purporting to be an additional inventory to the inventory of the estate of the deceased, certified under the hand and seal of the Register of Wills to be a true copy taken from the original additional inventory offered, (not proved,) by the administrator, and lodged in the office of the register—*Held* not to be competent evidence to charge the administrator with the amount of the goods and chattels therein mentioned.

An original paper, purporting to be an "additional inventory to the inventory of the deceased, offered by the administrator," proved to be in the hand-writing of a person who acted as a clerk for the administrator, and endorsed "additional inventory," in the hand-writing of the administrator, found among the papers in the office of the register of wills, wrapped up in the original inventory of the estate of the deceased—*Held* to be competent evidence to charge the administrator with the several sums of money specified in the said paper, as part of the goods and chattels of the deceased.

APPEAL from the General Court. The Appellant brought an action of *debt* upon the *administration bond* of *Ezekiel*

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Forman, (who was administrator with the will annexed of *Sarah Emory*) against the executrix of *John Thompson*, who was the security of *Forman* in the said administration bond. The defendant (now appellee,) pleaded *performance*, *specially*, and the plaintiff replied *nonperformance*, stating a bequest by *Sarah Emory* to the plaintiff's intestate, of sundry parts of her personal estate, which had been bequeathed to her by her deceased husband, over and above her thirds; that after paying the debts, &c. there remained a residuum of £1000 current money, &c. *Rejoinder*, that after paying debts, &c. there did not remain of the estate, &c. any residue, but that the whole estate was paid away in payments of debts, &c. Issue joined.

1. At the trial at September term 1805, the plaintiff, having given in evidence a copy of the inventory of certain goods and chattels of *Sarah Emory*, then offered an official copy of a certain paper, purporting to be an *additional inventory* to the inventory of her estate, and certified under the hand and seal of the register of wills in and for *Queen-Anne's* county, as evidence to charge *Ezekiel Forman*, in his capacity of administrator of *Sarah Emory*, with the several sums of money therein specified, as part of the chattels, rights and credits, of *Sarah Emory*. The certificate was thus: "Additional inventory to the inventory of Mrs. *Sarah Emory's* estate, offered by *Ezekiel Forman*, the administrator." [*Here follow the articles, &c.*] "*Maryland, Queen Anne's* county, to wit: I do hereby certify, that the above and foregoing instrument of writing is a true and perfect copy, as copied from the original additional inventory of *Sarah Emory*, offered by *Ezekiel Forman* administrator, and lodged in my office. In testimony," &c. *Signed by the present register the* 16*th* of *August* 1803. The defendant objected to the certificate, and contended that the same was not competent evidence in law to charge *Ezekiel Forman* with the amount of chattels and credits therein mentioned, as proposed by the plaintiff, or with any part thereof. And the court, [*Chase*, Ch. J. *Done*, and *Sprigg*, J.] sustained the objection. The plaintiff excepted.

2. The plaintiff, having given in evidence a copy of the inventory of certain goods and chattels of *Sarah Emory*, then produced two certain original papers in writing, as

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follow, to wit: A. "Additional inventory to the inventory of Mrs. *Sarah Emory's* estate, offered by *Ezekiel Forman*, the administrator." [*Here follow the articles.*] B. "Except the bonds due to the estate, the crop of wheat and tobacco, and the money found in the estate, a particular account of which is lodged with the court by the administrator." And the plaintiff proved, by *William H. Nicholson*, Esquire, register of wills for *Queen-Anne's* county, that when applied to for copies of original papers in the above cause in April 1804, he found the original papers carefully wrapped up in the original inventory of the estate of *Sarah Emory*, and filed in a bundle of other papers belonging to his office, and he has no recollection of having seen this paper before; but he finds that he gave a certificate of the paper on the 21st of October 1799, for the plaintiff, but has no recollection of the situation in which the paper was in 1799; but from the manner in which papers are usually filed away in his office, he believes that in the year 1799, the paper was wrapped up in the same situation that he found it in April 1804; that he was appointed register of wills in the year 1796, and he has no knowledge of the time or by whom the above paper was brought into the register's office, but believes, and is firmly convinced, that it was lodged in the office before he was appointed register. The plaintiff further proved, by competent evidence, that the writing on the paper marked A, was the hand-writing of one *Donald M'Quinn*, who acted for several years as the clerk of *Ezekiel Forman*; but the witness, by whom the hand-writing of *Donald M'Quinn* was proved, declared that he had no knowledge at what time and at whose instance the paper was made out, nor has he any knowledge of its being lodged in the register's office for *Queen-Anne's* county, and that the words "additional inventory," endorsed thereon, were the hand-writing of *Ezekiel Forman*; and also that the writing on the paper marked B, was the hand-writing of said *Forman*. The plaintiff then offered the original papers, so proved, as evidence to charge *Ezekiel Forman*, in his capacity of administrator of *Sarah Emory*, with the several sums of money specified in the paper marked A, as part of the chattels, rights and credits, of *Sarah Emory*. But the defendant objected to said papers, and contended that the same were not competent evidence. And the court, [*Chase*, Ch. J. *Done*, and

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Sprigg, J.] were of opinion, that they were not competent evidence in law to charge *Ezekiel Forman*, as aforesaid, and refused to permit them to be given in evidence to the jury. The plaintiff excepted. *Verdict* and judgment for the defendant.

Wright, *Hammond*, and *John Scott*, for the Plaintiff.

Martin, (Attorney General,) *Carmichael*, and *James Scott*, for the Defendant.

The plaintiff appealed to this court.

THE COURT concurred with the General Court in the opinion expressed in the *first* bill of exceptions, but dissented from that expressed in the *second*.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

CHAPLIN *vs.* CRUIKSHANKS. JUNE, (E. S.)

In an action of *Slander* for words spoken, it was alleged that the defendant had charged the plaintiff with poisoning his, the defendants' horse—*Held*, that the words were not actionable.

The court refused to direct the jury, that if the horse was alive, the words laid in the declaration were not actionable, the same being irrelevant to the issue

The court also refused to direct the jury, that if the words spoken did not amount to an offence for which the plaintiff might be indicted, they were not actionable, as the defendant might take advantage of it in arrest of judgment

APPEAL from *Kent* county court. The plaintiff in the court below, (now appellee,) an infant 19 years of age, by his next friend, brought an action of slander against the defendant, (the appellant.) The first set of words charged in the declaration, with the usual inuendoes, were— "my horse is poisoned, and will die, and *Robert Cruikshanks* had done it, and that he had furnished a certain negro *Charles* with oil of vitriol, which the said negro *Charles* had rubbed upon him, and that he also believed that the same was premeditated." The second set of words, as charged, were the same words, adding, "and that he believed that he was capable of such things, and that he would make no secret of it, but would tell it every body." Plea not guilty, and issue joined.

1. The defendant, at the trial, moved the court to direct the jury, that if they should be of opinion, that the horse, which the defendant is alleged to have charged the plaintiff with poisoning, was still living, that then the words laid in the declaration are not actionable, and of course their verdict must be for the defendant. But the court, [*Tilghman*, Ch. J.] was of opinion, that the above was irrelevant to the issue, and therefore refused to give any direction thereon to the jury. The defendant excepted.

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2. The plaintiff having brought this action of slander against the defendant, in which he alleged that the plaintiff had poisoned his horse, and there being no averment in the declaration that the horse was dead, the defendant moved the court to direct the jury, that if they should be of opinion, that the words charged in the declaration to have been spoken by the defendant, were really so spoken, yet as it did not amount to an offence for which the plaintiff might be indicted, the words were not actionable, and of course their verdict must be for the defendant. But the court, [*Tilghman*, Ch. J.] declined giving the direction to the jury on the subject, as the defendant might take advantage of it in arrest of judgment, and accordingly refused to do so. The defendant excepted. *Verdict* for the plaintiff, and damages assessed to £25 current money. *Motion* by the defendant in *arrest of judgment* "for that the declaration of the plaintiff is insufficient, there being no cause therein stated, on which the said action can be maintained." The county court over-ruled the motion, and rendered judgment on the verdict for the plaintiff.

Carmichael and *Frisby*, for the Plaintiff, and *Wright* and *Houston*, for the Defendant.

The Defendant appealed to this court.

The Court concurred in the opinions given by the court below in both of the *bills of exceptions;* but *reversed* the judgment, because the *words* laid in the declaration were not actionable.

JUDGMENT REVERSED.

JUNE, (E. S.)

Martin and Smith *vs.* Gunby, *et al.* Lessee.

In an action of ejectment brought by the lessee of the *Vestry of a Parish*, the plaintiff, in order to prove title to the lands in question, offered to read in evidence certain entries in a book, purporting to be, and proved by a witness, who was formerly rector of the vestry to be handed down to him as the vestry book of the parish—*Held*, that the testimony was inadmissible.

Appeal from *Worcester* county court. The appellee, (the plaintiff in the court below,) brought an action of *ejectment* on a demise from *The Vestry of All Hallows Parish*, to wit, *John Gunby*, &c. &c. of a tract of land called *Snow Hill*, it being part of lot No. 9 in the town of *Snow Hill*, in the county of *Worcester*. The defendants below pleaded *not guilty*, and took general defence. At the trial, the plaintiff offered to read in evidence certain entries in a book purporting to be, and proved by *Robert Handy*, who was formerly rector of the vestry, to be hand-

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ed down to him as the vestry book of the parish of *All Hallows*, viz. "The proceedings of a vestry held at *Snow Hill*, to wit, the 4th March 1694-5. This vestry hath appointed that the church shall be built at *Snow Hill*, upon the lot formerly laid out for that use, and by reason that the distance of 50 or 60 miles may not answer all person's conveniency to attend from the remote inhabitants, therefore it is agreed by this vestry to have a chappell of ease, the better to answer the more northern inhabitants of the sea side. It is further agreed by this vestry to build a church at *Snow Hill* of 40 feet long," &c. "May the 5th 1741. Cap. *James Martin* moves to the vestry of this parish, for the liberty of building a small house on the lower end of the church lot, near the river side, to set up a pair of scales in; and the said *Martin* has liberty to remove the said house and scales off the lot aforesaid, when he shall think so fit." The defendant objected to the evidence as incompetent. But the court [*Polk*, Ch. J.] overruled the objection, being of opinion that the testimony was legal, and admissible. The defendants excepted. *Verdict* and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued at June term 1807, before CHASE, Ch. J. TILGHMAN, NICHOLSON, and GANTT, J. by

J. Bayly and *Whittington*, for the Appellant, and by *W. B. Martin*, *Dennis* and *Wilson*, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

HOWARD *vs.* MOALE, *et al.* Lessee.

JUNE.

The death of one of the lessors of the plaintiff, in an action of ejeetment, may be suggested after the jury are sworn, and his heir, &c. need not appear, or be made a party

On the question, whether or not a grant of land from the proprietary to "R M, and the heirs of his body lawfully begotten, for ever," created an estate tail in R M, and upon his death without issue, the reversion was in this state standing in the place of the proprietary, notwithstanding R M's deed barring the estate tail. *Held*, that no interest in the nature of a trust estate ever was vested either in the proprietary, or in the state in the place of the proprietary, no act having been done which could create a trust in either; and that they could only be considered as parties having a reversionary interest expectant on the determination of the estate tail

The *jura regalia*, as attached to the person of the king in *England*, never did attach to the lord proprietary of *Maryland*

The proprietary held the dominion of *Maryland*, and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary, legal and equitable rights, as in the hands of any other person

On an equitable interest being obtained in land agreeably to the rules of the land office, the party became entitled to a grant which he could compel of the proprietary

APPEAL from the General Court. The appellee, on the 5th of May 1801, instituted his action of *ejectment* for a

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tract of land called *David's Fancy*, situate in *Baltimore* county, into *forty-eight* separate parts, to be divided, nine parts of which were demised by *John Moale*, nine parts by

The reversionary interest of the proprietary, reserved in lands granted by him, might be destroyed by deed made by the tenant in tail, under the act of June 1773, *ch.* 1, as effectually as the reversionary right of any individual

The state held the proprietary's reversionary interest merely by substitution in his place, and a deed since the act of November 1782 *ch.* 23, was competent to bar and extinguish the reversionary interest of the state

A grant for escheat land will relate back to the original grant

A subsequent grant, covering land on which the proprietary had a reversionary interest, will operate to pass such reversionary interest

A grant of land surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such granted to a third person. (*Note*)

An escheat certificate and grant do, by operation of law, relate to the original tract, and is strictly within the principle and rule of law of relation between grants and certificates

Where the first and second courses of an original grant of a tract of land called D F, are described as "beginning at a bounded locust tree, being the N E bounded tree of D P's land, [called U C,] and running by the land of the said P, E 65 ps to a bounded oak, their N E 150 ps. to a bounded red oak of the said *P*'s land; and the first and second courses of an escheat grant of the same land called D F, is described as "beginning at a locust now bounded at or very near to the place where stood a bounded locust, the original beginning tree of D F, and a bounded tree of a tract of land called U C, formerly laid out for D P, and running thence with the said land E 65 ps. (it being expressed in the certificate of the original survey to run by the land of the said *P*, E 65 ps. to a bounded oak, which cannot be found,) thence N E 238 ps still bounding on the said land, to the N W branch of *Patapsco* river, (it being therein expressed to run N E 150 ps. to a bounded red oak of the said P's land, and the certificate of the said P's land mentioning to run that course to a bounded red oak standing by the side of the said N W branch, which oak is not known.") *Held*, that there was no doubt or ambiguity, and that of the beginning of D F is rightly located on the plots at the termination of the twelfth line of U C, and there is no evidence of the existence of any tree as called for at the termination of the first line of D F, then the expressions in the escheat grant do bind that grant to the true location of the original tract called D F, as to the two first lines thereof, so far as the second line of the original did actually extend; and that the first and second lines of the original tract do, by virtue of the expressions therein used, bind those lines on the thirteenth and fourteenth lines of U C

Where the plaintiff has not located his escheat grant on the plots in the cause co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant; but he is estopped by that location from going beyond the letter V, located on the plots, from whence he must run to the head of *Howard's* Branch, at whatsoever point the same may be agreeably to his location of his pretensions, and the location by which the defendant has taken defence

The plaintiff cannot give any evidence of the lines of his escheat grant, running otherwise than he has located them on the plots in the cause as his pretensions; but he is not precluded from giving evidence of any other lines, as the lines of the original tract, by way of illustration; and he may support the location of his pretensions, so far as he can show that they are located within the limits of the original tract

From the place where the second line of a tract of land terminated, the third line thereof, viz. "Then N N W 86 ps to a bounded red oak, then," &c. must run the number of perches expressed in the grant, and cannot in its length be increased or diminished, unless proof is made of the tree called for, or the place where it stood

So the fourth line, viz. "Then S W to the head of *Howard's* Branch, then," &c. must run a straight line to the head of *Howard's* Branch

A private plot of the lands in dispute, permitted, under certain circumstances, to be read in evidence

The course and distance expressed in a grant of land, must always be controlled by a call expressed therein as the termination of the course; and the following course and distance used in the grant, viz. "N E 50 ps. to a small branch which maketh the outward narrows of the said land," must be complied with, as nearly as they can, to strike the branch described, as it existed at the time of the survey, subject to the variation of the compass on that line

The court refused to direct the jury, that the second line of a tract of land, viz. "Then N E 150 ps. to a bounded red oak of the said P's land," (being the fourteenth line of that land, which tree being lost, the place where it stood could not be proved,) must terminate at the end of 150 ps from the beginning thereof, it being a matter of fact to be left to the determination of the jury

The court refused to direct the jury, that an escheat grant did not pass any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same

A deposition taken on the survey, of a witness, who was absent out of the state at the time of the trial, was permitted to be read in evidence, due diligence having been used to obtain the attendance of the witness

The court directed the jury, that they might find the true location of D F, for which the ejectment was brought, by a greater or less variation of the compass, as might appear to them proper from the evidence; provided that by such allowance of variation they did not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V to the head of *Howard's* Branch

The court directed the jury, that the plaintiff could not recover any land which should be found to lie without and be cut by a straight line to be drawn from the letter V, to the head of *Howard's* Branch, (he having located that line of his grant in that manner,) although those lands should lie within the lines of the tract of land for which the ejectment is brought, and also within the lines of the plaintiff's pretensions, as located on the plots

The court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land, for which the ejectment is brought, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true boun-

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Richard H. Moale, nine parts by *Robert North Moale*, nine parts by *Samuel Moale*, nine parts by *Randle Hulse Moale*, one part by *Thomas Moale*, one part by *Richard Curson, Junior*, and one other part by *Rebecca Russell*. The defendant, (now appellant,) pleaded *not guilty*, and took defence on the plots made and returned in the cause.

The plaintiff, at the trial court, in May 1804, made his claim and pretensions for a tract of land called *David's Fancy*, resurveyed for *John Moale*, on the 1st day of November 1738, as the same is located by him, the plaintiff, upon the plots returned in the cause, as per table of courses No. 2, viz. From the letter *A*, (1) N. 86¾, E. 65 perches, (2) N. 41¾, E. 235 perches to *b*, (3) N. 25¾, W. 86 perches to *V*, (4) N. 86, W. 112½ perches to *F*, (5) S. 51, W. 14, (6) S. 24, W. 5, (7) S. 67, W. 12, (8) S. 10¾ W. 40, (9) S. 70, W. 4, (10) S. 47, W. 6, (11) S. 36½, W. 16, (12) S. 54, W. 21, (13) S. 75, W. 8, (14) S. 18½ W. 14, (15) S. 71, W. 14, (16) S. 35, W. 14, (17) S. 89, W. 10, (18) S. 28, W. 14, (19) S. 8, W. 18, (20) S. 10½, E. 18, (21) S. 65, E. 18, (22) S. 14¾, E. 38, (23) S. 40½, E. 23, (24) S. 7, W. 31, (25) thence to the beginning, containing 257 acres. The defendant took defence for all that part of *Lun's Lot*, granted to *Edward Lun* on the 20th of July 1673, beginning at red *A* on the plots, and running with the black drawn lines, red figures 1, 2, 3, 4, 5, 6, 7, 8, 9, then with the blue shaded line to *P*, then with the black drawn line to 4, then with the red broken dotted line to *V*, then to red 1, then with the black lines, black figures 19, 20, red figures 14, 15, 16, 17, 18, 19, and then to red *A*, as per table of courses No. 26. *Judgment* was entered against the *casual ejector* for the land called *David's Fancy*, undefended on the plots by the defendant. After the jury were sworn by the issue, the plaintiff, by his attorneys, suggested, that since the demises in the declaration, and the institution of this suit, and before then, &c. to wit, on, &c. *Richard H. Moale*, one of the lessors in the declara-

tion, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff.

The jury, by their verdict, in an action of ejectment, having found the true location of the land, for which the ejectment was brought, to be from *A* to *a*, to 3, to four perches below big *F*, the head of *Howard's* Branch, and then to *A*; they also found for the plaintiff his pretensions, (not being to the extent of the said location,) to be from *A* to *a*, to *V*, to four perches below big *F*, the head of *Howard's* Branch, and then to *A*, and that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land. *Held*, that there was no uncertainty in the verdict.

A mortgage of lands to a *British* subject before the revolution, was not thereafter defeated by the act of confiscation, but it was protected by the *British* treaty, and the mortgage property was decreed to be sold to pay the mortgage debt. *(Notes.)*

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tion mentioned, who demised nine parts of the premises, (in forty-eight parts to be divided,) to the plaintiff, had died, and which was not denied.

1. *The first bill of exceptions.* The plaintiff, to make title to the tract called *David's Fancy*, read in evidence a certificate of survey of *David's Fancy* made for *David Williams* on the 22d of June 1671, and containing 100 acres, which certificate recites, that by virtue of a warrant granted unto *Robert Wilson* for 650 acres, bearing date the 17th of June 1671, 100 acres thereof was assigned unto *David Williams*, by *Wilson*, there was, therefore, laid out for *Williams* "a parcel of land called *David's Fancy*, lying in *Baltimore* county, on the N. side of *Patapsco* river, and on a branch called the Middle Branch, beginning at a bounded locust tree, being the N. E. bounded tree of *David Poole's* land *(a)*, and running by the land of the said *Poole* E. 65 perches, to a bounded oak, then N. E. 150 perches to a bounded red oak of the said *Poole's* land, then N. N. W. 86 perches to a bounded red oak, then S. W. to the head of *Howard's* Branch, then bounding on the said branch, and the said Middle Branch, to the first bounded tree, containing and laid out for 100 acres more or less." The plaintiff also offered in evidence a patent for the land called *David's Fancy*, granted to *Williams* on the 1st of May 1672. The courses, &c. in the patent corresponding with those in the certificate, except in the patent the *S. W.* course, last above mentioned, is described to run "S. W. and by W. to the head of *Howard's* Branch," &c. He also offered evidence, that *Williams* departed this life, intestate, and without heirs. He also produced and read to the jury, a warrant of escheat issued to *John Moale*, setting forth that there was escheat to the Lord Proprietary, a tract of land called *David's Fancy*, lying in *Baltimore* county, on the W. side of the Middle Branch, originally granted on the 1st of May 1672, to *David Williams*, for 100 acres. That on the 18th of March 1722, a certain *Thomas Cromwell*, by his petition, setting forth that he was seized in fee thereof, obtained a special warrant to resurvey it, and a certificate thereof was returned, by which it appeared that there were 83 acres of surplus land included, for which *Cromwell* never compounded nor sued out grant of confirmation thereon, contrary to sundry

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of his Lordship's proclamations for that purpose published. That apprehending his Lordship's rights had not been complied with, *Moale*, on the 14th of April 1737, obtained a special warrant to resurvey the said tract in order to have the benefit of the surplus, and the contiguous vacancy, if any. That since, upon the strict search made both in the records of the provincial court and county court of the county where the land lay, as also in the records of the commissary's office, he could not find any conveyance from *Williams* to one *John Athrine*, who had pretended a right to the land, nor to any other person, nor that ever he willed the same to any person whatsoever; by which means, *Moale* was advised that the land had become escheat to his Lordship; and he, being the first discoverer, and desirous to purchase his Lordship's right thereof, be it escheat by the means aforesaid, or by any other ways or means whatsoever, prayed a special warrant to resurvey the same, &c. which was granted, &c. and the surveyor was directed carefully to resurvey, for and in the name of *Moale*, the tract of escheat land called *David's Fancy*, according to its ancient metes and bounds, with its surplusage, and by his outlines adding what vacant land he could find to the same contiguous, whether cultivated or otherwise, not running his lines, &c. He also offered evidence, that the warrant, not having been executed in time, was, on the 17th of May 1738, renewed for six months longer. That in virtue of the last mentioned warrant, a certificate of survey was returned, dated the 1st of November 1738, by which it appears, that there was resurveyed for and in the name of *Moale*, the tract of land called *David's Fancy*, with its surplusage, according to the ancient metes and bounds thereof, as shown to the surveyor, lying in the county aforesaid, on the E. side of the middle branch of *Patapsco* river, beginning at a locust now bounded at or very near to the place where stood a bounded locust, the original beginning tree of *David's Fancy*, and a bounded tree of a tract of land called *Upton Court*, formerly laid out for *David Poole*, and running thence, with the said land, E. 65 perches, (it being expressed in the certificate of the original survey to run by the land of the said *Poole*, E. 65 perches to a bounded oak, which cannot be found,) thence N. E. 238 perches, still bounding on the said land to the N. W. branch of *Patapsco* river, it being therein express-

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ed, to run N. E. 150 perches to a bounded red oak of the said *Poole's* land, and the certificate of the said *Poole's* land mentioning to run that course to a bounded red oak, standing by the side of the said N. W. branch, which oak is not known, thence N. N. W. 86 perches, S. 85° 30′ W. 133 perches, to the head of *Howard's* Branch, it being expressed to run S. W. to the head of *Howard's* Branch, thence bounding on the said branch, and the aforesaid Middle Branch, to the first bounded tree, as mentioned in the certificate of the original survey, as follows, viz. S. by W. 16 ps. S. 41, E. 16 ps. N. 83, W. 24 ps. S. W. 40 ps. N. 73, W. 10 ps. S. 22, W. 24 ps. W. 9 ps. S. 80, W. 12 ps. N. 74, W. 10 ps. still bounding on *Howard's* Branch to the Middle Branch, thence S. 38, W. 16 ps. S. 11, W. 15 ps. S. 2, E. 12 ps. S. 12, E. 12 ps. S. 70, E. 12 ps. S. 12, E. 38 ps. S. 87, E. 28 ps. still bounding on the Middle Branch, and thence by a straight line, bounding on the branch, to the beginning, containing and laid out for 257 acres more or less, to be held," &c. "by the name of *David's Fancy.*" He also read in evidence the grant issued thereon to *Richard Moale*, dated the 29th of September 1750, which grant recites, that *Charles Croxall*, (guardian and next friend to *Richard Moale*, an infant, under the age of twenty-one years,) did set forth, that a certain *John Moale*, deceased, father to *Richard*, did heretofore set forth that there was escheat, &c. (as in the recital in the special warrant granted to *John Moale*,) that a warrant issued, was renewed, and a resurvey made, and certificate thereof returned, by which it appeared, &c. That before *John Moale* obtained a grant of confirmation for the same, he died, but before his death he made his last will and testament, in which was the following bequest: "Item. I give and bequeath unto my infant son, to be christened by the name of *Richard*, all that tract of land I bought of *Jacob Giles*, named *Upton Court*, and also the land adjoining thereto, which I escheated and paid his Lordship's agent for, as per the receipt on the back of the certificate now in the office, the patent not yet being issued out, to him my said beloved infant son, and his heirs lawfully begotten, from him and their bodies, for evermore; but if either of my aforesaid sons should die without such heirs aforesaid, then it is my will, that the land which I have herein devised the dead son, heir less, shall go to the living son, to be held of him, and his lawful heirs, from ge-

neration to generation as aforesaid." *Croxall*, therefore, prayed, that for as much as the right of the escheat land was in *Richard Moale*, and all requisites complied with, grant of confirmation might issue to him on the certificate, agreeably to the bequest aforesaid, &c. Therefore, in consideration thereof, and other the premises, &c. the "Lord proprietary did give, grant and confirm, unto him, "the said *Richard Moale*, and the heirs of his body lawful-"ly begotten, for ever, agreeably to the bequest aforesaid, "all that the aforesaid tract or parcel of escheat land re-"surveyed, and still called *David's Fancy* lying," &c. as described in the certificate herein before mentioned—"To "have and hold the same unto him the said *Richard Moale*, "and the heirs of his body lawfully begotten, for ever; to be "holden, of" &c. He also read in evidence the last will and testament of *John Moale*, for whom the certificate of survey was made and returned, dated the 14th of January 1739–40. Whereby he devised to his son *John*, to him and his heirs lawfully begotten from his and their bodies, for ever more, sundry parcels of land; and he also devised to his infant son, to be christened by the name of *Richard*, the lands mentioned in, and in the manner set forth in the grant last before mentioned. He also read in evidence a deed of indenture dated the 11th of April 1783, from *Richard Moale* to *James Croxall*, reciting that *Moale* was seized of an estate, in fee tail, in and of a tract of land called *David's Fancy*, (saving and excepting that part thereof before conveyed by him to *Mary Tribolet*,) lying, &c. and it was the intent, meaning and design of *Moale*, according to the act of assembly, &c. fully and effectually to bar, dock and destroy the entail, and to grant, convey and transfer to *Croxall*, and his heirs, absolutely and fully, the said tract of land, (saving and excepting as aforesaid,) with the appurtenances thereunto belonging, in order, and with the intent, and for the purpose, that *Croxall*, on his becoming thereby seized thereof in fee simple, might reconvey and assure unto *Moale*, and his heirs, the tract of land, &c. in consequence and on the operation whereof, *Moale* might be and stand seized of, and be entitled unto, the premises, fully and absolutely, in fee simple. The indenture, therefore, witnessed, that *Moale*, in consideration of the premises, and also for and in consideration of the sum of five shillings, &c. granted, &c. unto *Croxall*, the tract of land, (saving

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and excepting as aforesaid.) in the usual form. He also read in evidence a deed of indenture, dated the 12th of April 1783, from *James Croxall* to *Richard Moale*, for the tract called *David's Fancy*, excepting that part sold by *Moale* to *Mary Tribolet(a)*. He also offered in evidence, that *Richard Moale* died sometime in the year 1786, without issue of his body lawfully begotten, having first duly made and executed his last will and testament in writing, dated the 22d of February 1786, whereby he devised all that part of the tract of land called *David's Fancy*, for which this suit is brought, to his brother *John Moale*, in fee simple. That *John Moale*, the devisor first named, left, at the time of his death, two sons, to wit, *John Moale*, his eldest son and heir at law, and *Richard Moale*, the patentee before named. That *John Moale*, the devisee last named, died in the year 1797, having first duly made his last will and testament, dated the 20th of July 1797, whereby he devised all that part of *David's Fancy*, for which this suit is brought, to his sons *John Moale*, *Richard Moale*, *Robert North Moale*, *Samuel Moale*, *George Washington Moale*, and *Randle Hulse Moale*, their heirs and assigns, to be equally divided between them, share and share alike, as tenants in common. He also gave in evidence, that *George Washington Moale*, the devisee mentioned in the last mentioned will of *John Moale* the younger, died after his father *John Moale*, in the year 1797, intestate, unmarried, and without a child. That the lessors of the plaintiff, to wit, *John Moale*, *Richard H. Moale*, *Robert North Moale*, *Samuel Moale*, *Randle Hulse Moale*, *Thomas Moale*, *Rebecca Russell*, and *Elizabeth*, wife to *Richard Curson*, in the declaration mentioned, are the children and the only children, of *John Moale*, the last named devisor; that *Richard Moale*, one of the lessors of the plaintiff, died since the bringing of this suit, andduring the pendency thereof, leaving issue now in full life. He also offered evidence, that the true location of the land called *David's Fancy*, granted to *David Williams* in 1672, is, as he hath located the same upon the plots returned in this

(a) The defendant's attornies, at this stage of the trial, made their objections to the grant to *Richard Moale*: but as the bill of exceptions contained the whole evidence of title adduced by the parties, we have adopted the mode pursued in the bill of exceptions.

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cause; and also that the true location of the land called *David's Fancy*, granted to *Richard Moale* in 1750, for the recovery of which this suit is brought, is the same as that of *David's Fancy*, the original, granted to *David Williams* in 1672, as located by the plaintiff on the said plots. The defendant then read in evidence the certificate of survey, dated the 10th of October 1672, and grant of *Lun's Lott*, to *Edward Lun*, bearing date on the 20th of July 1673, whereby it appears that there was surveyed "a parcel of land lying in *Baltimore* county, on the N side of *Patapsco* river, and on a branch called the N W Branch, called *Lun's Lott*, beginning at a bounded hickory standing on the W side of the falls of the N W branch, and in the line of the land of *Thomas Perte* and *Robert Benjor*, called *Salisbury Plaine*, and running with the line of the said land N W and by N 38 ps. to a bounded hickory in the line of the said land, then S W 165 ps. to a bounded red oak, then S 40 ps. then W N W 45 ps. to a bounded hickory by the head of a branch, then S 125 ps. to a bounded red oak, then W and by S 20 ps. then S and by E 40 ps. then S E 80 ps. to a bounded Spanish oak, then S 60 ps. to a bounded white oak in the land of *John Howard*, called *Timber Neck*, then by the said land E S E 74 ps. to a bounded white oak of the said *Howard's* land, then S E 120 ps. to a bounded red oak standing in a bite of the N W branch, then bounding on the said branch lying up N 50 ps. to a bounded red oak, then N N W 38 ps. then W N W 100 ps. then N and by W 50 ps. to a locust marked with four notches, then N N E 45 ps. to a bounded red oak in the line of the land of *Thomas Cole*, then W 75 ps. to a bounded oak of the said *Cole's* land, then by the said land N N E 275 ps. to another bounded oak, then E 65 ps. to the falls, then bounding on the said falls to the first bounded tree, containing 200 acres, more or less," &c. He also read in evidence the certificate of survey, dated the 8th of April 1762, and grant of *Lun's Lott Enlarged*, dated the 25th of March 1763, surveyed for and granted to *Cornelius Howard*, and *Ruth* his wife, and containing 414 acres, more or less, being in virtue of a special warrant to resurvey a tract of land called *Lun's Lott*; and also proved, that *Lun's Lott* and *Lun's Lott Enlarged*, are truly located on the plots returned in this cause. He also offered evidence to prove, that he is heir at law to *Edward*

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Lun, the patentee of *Lun's Lott*, and also the heir at law of *Cornelius Howard*, and *Ruth* his wife, the patentees of *Lun's Lott Enlarged*. The defendant then prayed the opinion of the court, and their direction to the jury, that the plaintiff, upon the above statement of facts, hath not made title to the lands for which the defendant hath taken defence in this cause, nor any part thereof, and cannot recover in this action.

Ridgely, for the Defendant, contended, that the grant to *Richard Moale* of the 29th of September 1750, for *David's Fancy*, vested in him an *estate tail*, and that upon his death, without issue, the reversion is in the state of *Maryland*, standing in the place of the proprietary; and that the deed from *Moale* to *Croxall* had not the effect to bar the estate tail. He cited the act of assembly of *Nov.* 1782, *ch.* 23. *Pigott*, 85, 87, 88, 89. *Neal vs. Wilding*, 1 *Wils.* 275. *Pool vs. Nedham*, *Yelv.* 149. *Anon. Noy*, 132. 18 *Vin. Abr.* tit. *Common Recovery*, 233, *pl.* 9. 5 *Bac. Abr.* tit. *Prerogative*, (E. 5.)

Shaaff, on the same side, cited the *act of assembly* of *October* 1780, *ch.* 45. *Owings vs Norwood's Lessee*, *(ante* 96.) *Allen vs. Stewart and Patten*, *(a)*. *Laws*

(a) In the case of *Allen vs. Stewart* and *Patten*, in the court of chancery, at May term 1799, the bill was filed on the 29th of August 1798, and it was admitted, that the land mentioned in the bill was mortgaged to *Allen* by *Patten* on the 20th of May 1771, to secure the payment of £142 0 6 sterling money, with interest thereon on the 20th of May 1773. It was admitted that *Allen* was a subject of the King of *Great Britain*, residing in *Maryland* in 1775, and went to *England* in that year, and had resided there ever since. It was submitted to the chancellor to determine, from what time and for how long the mortgagee was entitled to recover interest on the mortgage debt.

Hanson, Chancellor. It appears, that under the circumstances of this case, the chancellor is under no necessity of deciding, or submitting to the general court, the question, as the complainant is a *British* subject, whether or not the interest of the complainant, in the mortgaged property mentioned in the bill, was defeated by the revolution in *America*, and the confiscation act of this state; and that the complainant is entitled to have his debt paid by the defendant, or discharged from a sale of the property. *Decreed*, that unless the mortgaged debt, with interest thereon (except from the 4th of July 1776 to the 3d of September 1783,) until paid, shall be paid on the 9th of November next, the property in the bill mentioned shall be sold, &c

Kilty and *Shaaff*, for the Complainant.
Moale, for the Defendants.

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vs. The Attorney General, (a). Kelly's Lessee vs. Greenfield, 2 *Harr. & M'Hen.* 121. *Russell's Lessee vs. Baker*, 1 *Harr. & Johns.* 71. *Gitting's jun.* Lessee *vs. Hall* (*ante* 112.) 5 *Bac. Abr.* tit. *Prerogative*, (E. 3.) *Com. Dig.* tit. *Estates*, (B. 31.) *Statutes* 34 *Hen.* VIII, *ch.* 20. *Acts of assembly* of *November* 1787, *ch.* 9, and 1785, *ch.* 87. *The State vs. Stump, et al.* 2 *Harr. & M'Hen.* 174. *Laidler vs. Young's Lessee*, (*ante* 69.)

Martin, (Attorney General,) *Key*, and *W. Dorsey*, for the Plaintiff, cited *Calvert's Lessee vs. Eden, et al.* 2 *Harr. & M'Hen.* 279. *Act of assembly* of *Nov.* 1782, *ch.* 23. *Doe vs. Pegge*, 1 *T. R.* 758, *(note). Armstrong vs. Peirse, et al.* 3 *Burr.* 1900. *Goodtitle vs. Jones*, 7 *T. R.* 46, per *Ashhurst*, J. *Doe vs. Wharton & Dixon*, 8 *T. R.* 2. *Gilb. on Uses & Trusts*, 83, 85, 86. 5 *Bac. Abr.* tit. *Prerogative*, (E. 3). *Owings vs. Norwood's Lessee*, (*ante* 96.)

Harper, in reply, cited *Hall vs. Gitting's* Lessee (June 1809). *Kelly's Lessee vs. Greenfield. Russell's Lessee vs. Baker. Gitting's Jun. Lessee vs. Hall*, and *Owings v. Norwood's Lessee.*

Done, J. delivered the opinion of the court.*(b)*. The court are of opinion, that no interest of the nature of a trust estate ever was vested, either in the proprietary of *Maryland*, or in the state of *Maryland* in place of the proprietary. There does not appear ever to have been any act done which could create a trust in either; and that the proprietary and the state could only be considered as parties having a reversionary interest expectant on the determination of an estate tail.

The *jura regalia*, as attached to the person of the king in *England*, never did attach to the lord proprietary of *Maryland.*

(a) The case of *Lawson vs. The Attorney General*, in the Court of Chancery in 1800, was similar to that of *Allen vs. Stewart* and *Patten*. In 1769, one *Semple* mortgaged lands to *Lawson*, a *British* subject, and being nothing more than to secure the payment of a debt, it was protected by the treaty. The *attorney general* was made a party, who admitted the legal estate to be in the state, and the land was decreed to be sold for the payment of the mortgaged debt.

(b) *Chase*, Ch. J. did not sit, his sister being interested in the land in question.

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The lord proprietary held the dominion and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary legal and equitable rights, as in the hands of any other person; and on an equitable interest being obtained, agreeably to the rules of his land office, by any person taking out a warrant, returning a certificate of survey, and paying the composition money, the party became entitled to a grant which he could compel from the proprietary.

In the present case, suppose the right of the proprietary to have continued in full force until the year 1783, his reversionary interest in the lands in question would have been destroyed by the deed made by *Richard Moale*, the grantee in tail, under the operation of the act of 1782, as effectually as the reversionary right of any citizen of *Maryland*.

The question then occurs, whether the case is materially altered by the proprietary's rights passing into the hands of the state?

On this view of the subject, a doubt might arise, whether the state, being vested with the sovereignty as a body politic, can be affected by any laws in which she is not specially named. But this difficulty, in the opinion of the court, is removed, when we consider the state as standing in the place of the proprietary, in which view, and no other, we think the state can be considered in this case, as having no beneficiary interest in the lands in question, but holding the proprietary's reversionary interest merely by substitution in his place, and for the use and benefit of those who had the right in virtue of the escheat and purchase from the proprietary.

By the last will of *John Moale*, the elder, his interest in the lands passed agreeably to the disposition made by the said will, and the deed, made in 1783, by *Richard Moale*, the devisee, and the patentee of the land, was competent to bar and extinguish the reversionary interest of the state.

As these points have been elaborately and ingeniously argued by the learned counsel concerned, the court have thought proper thus shortly to notice them, and express their ideas relative to them.

But let us suppose that the opinion of the court, so far, is not well founded, every objection to the plaintiff's title, arising from any particular prerogatives or privileges in the

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proprietary or the state, which would protect their rights from being affected in the same manner as those of citizens, is, in the opinion of the court, completely removed by the operation of the grant of *Lun's Lot Enlarged.*

The escheat and grant of the proprietary thereon will relate back to the original grant of *David's Fancy*, and there is no ground on which to presume that the escheat fell previously to the grant of *Lun's Lot*, the original, but on the contrary the presumption is strong that it did not occur until nearly about the time of the obtention of the escheat warrant.

By the grant of *Lun's Lot Enlarged*, all the reversionary interest of the proprietary in *David's Fancy*, so far as *Lun's Lot Enlarged* interferes with and includes any part of *David's Fancy*, passes to a citizen, and of course is liable to be operated upon, and barred, in virtue of the act of assembly of 1782, by the deed from *Moale* to *Croxall* in 1783.

For these reasons the court refuse to give the opinion and direction to the jury, which is prayed by the defendant's counsel. The defendant excepted, *(a.)*

2. *The second bill of exceptions.* The plaintiff then read in evidence a certificate of the survey of a tract of land called *Upton Court*, made for *George Yate* on the 12th of March 1667, and a grant thereon issued to *David Poole* on the 2d of August 1668, by which it appears that there was surveyed "a parcel of land called *Upton Court*,

(a) D. Dulany, Esquire's opinion on the following case stated. A. was seized of a certain tract of land, under a title derived legally from the original grantee. B obtained a *common warrant* of survey, and under this warrant, a survey was made, which included part of the land that had before been granted to A, and B, on the certificate returned by the surveyor, obtained a patent. Afterwards A, who was seized as aforesaid, died without heirs, and without having conveyed, or disposed of his title, in consequence whereof the land, of which A died seized, *became escheat*. Afterwards C obtained a *warrant on the escheat*, and as a part of the land, whereof A died seized, was included in the survey of the grant to B, the *query* is, whether B is entitled to the part so included, or C, who claims under the escheat? I am of opinion that B is not entitled to any part of the land under the common warrant that he obtained, which he was not entitled to when he obtained thereon a patent, and as at the time when the patent was obtained by B, the title was in A under a prior grant, I am of opinion that B cannot legally claim any title to the part included in the patent to A.

Daniel Dulany,

August 13, 1783.

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lying in *Baltimore* county, on the N side of *Patapsco* river, opposite the land of *Hugh Kinsey*, beginning at a bounded red oak standing on the southernmost side of a point of land formerly called *Whetstone Point*, and from the said oak bounding on the said river by a line drawn N W and by N 40 perches, then N W and by W 40 perches, and from the end of the N W and by W line by a line drawn W 100 perches, bounded on the W by a line drawn W N W 30 perches, then N W 100 perches, to a small creek, then over the said creek by a line drawn W and by S 30 perches, then W S W 45 perches, then S W 80 perches to the mouth of another small creek, then over the said creek S and by W 45 perches, then *S W and by S 55 perches to* a point which maketh the mouth of a branch called the Middle Branch, then *bounding on the said branch by a line drawn N W and by N* 180 *perches* to a marked oak opposite a small island, and from the said oak *N E 50 perches* to a small branch which maketh the outward narrows of the said land, then *E* 65 *perches*, bounded on the E by a line drawn *N E* 150 *perches* to a bounded red oak *standing by the N W branch*, then E S E 56 perches, then E N E 120 perches, then E S E 44 perches, then S S E 100 perches to a small cove, then over the said cove by a line drawn S E 100 perches, to a point called The Sandy Point, then S S E 48 perches to another marked oak on Whetstone Point, and from the said oak to the first bounded tree, containing 500 acres of land more or less." He also gave in evidence the plots and locations in this cause, and the admission of the plaintiff and defendant, that the eleventh line of *Upton Court* terminated at the letter black H on the plots. He also gave in evidence, that the twelfth line of *Upton Court* terminated at the black letter A on the plots; and further gave in evidence to the jury that the beginning of *David's Fancy*, the original, was at the letter A; and also that the beginning of *David's Fancy*, the escheat in 1738, was at the letter A. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they find from the evidence in the cause that the *twelfth line* of *Upton Court* terminated at the letter A, and that the beginning of *David's Fancy*, the original, and *David's Fancy*, the escheat, was at the same place, that then the escheat certificate and pa-

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tent of *David's Fancy*, granted to *Richard Moale* in 1750, do by operation of law relate to the original tract called *David's Fancy*, patented in 1672; and that the expressions in the escheat grant contained, do, by operation of law, bind the escheat land to run with the true location of the original tract of *David's Fancy*, as to the *two first lines* thereof, so far as the said lines extend; and that the *first and second lines* of the original *David's Fancy*, do by virtue of the expressions therein used, bind the said lines to run with the 13*th and* 14*th lines* of *Upton Court*.

Shaaff and *Harper*, for the Defendant, referred to *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 190. *Darnall's Lessee vs. Goodwin*, 1 *Harr. & Johns.* 282. *Helm's Lessee vs. Howard*, 2 *Harr. & M'Hen.* 57. *Hammond's Lessee vs. Norris*, *(ante* 130;) and *Kyger vs. Kirkpatrick*, 1 *Harr. & Johns.* 298.

Done, J. delivered the opinion of the court. Three propositions have been stated by the prayer of the plaintiff's counsel, for the opinion of the court, and their direction to the jury.

1st. That the escheat certificate and patent of *David's Fancy*, granted to *Richard Moale* in 1750, do by operation of law relate to the original tract called *David's Fancy*.

2dly. That the expressions in the said escheat grant contained do, by operation of law, bind the said escheat land to the true location of the original tract called *David's Fancy*, as to the two first lines thereof; and

3dly. That the first and second lines of the original tract called *David's Fancy* do, by virtue of the expressions therein used, bind the said lines on the 13th and 14th lines of *Upton Court*.

On the *first point*, the court are of opinion that the escheat certificate and patent of *David's Fancy* do, by operation of law, relate to the original tract called *David's Fancy*. That this is a case strictly within the principle and rule of law, of relation between grants and certificates, which have been adopted and ratified by solemn decisions of the general court and court of appeals, and that in law, reason or equity, there can be no distinction.

With respect to the *second* and *third points* proposed, it has been contended by the defendant's counsel, that the

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court are precluded from acting upon them, by the decision of the court of appeals in the case of *Dorsey's Lessee vs. Hammond*, and that by the rule laid down by that decision, these are to be considered as questions of location, and must be left to the determination of the jury.

This court, let their private opinions be as they may, will always cautiously avoid interfering or clashing with the judicial decisions of the superior court, and will at all times pay respect to them as the established law of the land.

Whether too large a latitude is given to juries as to the construction of grants by the decision of the court of appeals in *Dorsey vs. Hammond*, and how far the rule and principle thereby adopted may operate to preclude uncertainty of decision, is not for us to consider.

The question then arises, whether the court are precluded by that determination from giving their opinion on the question now before them? and we think that we are not so precluded; but that the present question rests on grounds and principles entirely distinct from that case, and *Helms vs. Howard*, which has been cited to the court.

In *Dorsey's Lessee vs. Hammond*, the question was, whether the binding call in one course would be extended to the subsequent courses? the first using imperative binding expressions, which were dropped in those succeeding, then there were distinct courses, either of which might be pursued, and one of which must be rejected; and the court of appeals were of opinion, that this was a description with a double aspect; that it was ambiguous and doubtful, and that therefore it was discretionary which set of courses should be pursued, and ought to be left to the jury as a question of location.

The opinion of the judges in *Helm's vs. Howard* is founded on the same principle. In that case all the expressions could not be gratified; there were two distinct and different courses, one of which must be pursued, and the other rejected. Therefore, the court said, it must be left to the jury as a matter of location, to determine which must be adopted, and which rejected.

In the present case the court are of opinion, that no such doubt or ambiguity appears. Abstractly considered, the expressions are unquestionably binding, and the court of appeals have so far concurred with this court as to say,

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that we are competent to determine where expressions are imperatively binding by particular calls.

The court will not interfere with the right of the jury, by assuming any facts, nor will they take upon them to determine what is the true location of the several tracts of land delineated on the plots, or any of them, or the extent or termination of their lines. We will not take upon us to say, whether the tract called *David's Fancy*, as located by the plaintiff, begins at the right point, or whether there is or is not evidence to the jury of the existence of a tree at the termination of the first line of that tract, which would vary the course, or make it longer or shorter than the thirteenth line of *Upton Court*. But the court think, that they are not restricted by the decision in *Dorsey and Hammond*, from giving their opinion hypothetically in the present case, (which they believe to be strictly within the rule established in *Dorsey & Hammond,)* that if the jury should be satisfied from the evidence, that the beginning of *David's Fancy* is rightly located on the plots by the plaintiff, at the termination of the twelfth line of *Upton Court*, and there is no evidence to them of the existence of any tree as called for in the grant at the termination of the first line of *David's Fancy*, which would vary the same from the course or distance of the thirteenth line of *Upton Court*, that then the expressions contained in the escheat grant do, by operation of law, bind the said escheat land to the true location of the original tract called *David's Fancy*, as to the two first lines thereof, so far as the jury shall believe that the second line of *David's Fancy*, the original, did actually extend; and that the first and second lines of the original tract called *David's Fancy* do, by virtue of the expressions therein used, bind the said lines on the thirteenth and fourteenth lines of *Upton Court*. Which opinion and direction the court do accordingly give to the jury. The defendant excepted.

3. The defendant then prayed the opinion of the court, and their direction to the jury, that as the plaintiff hath in this cause located the land called *David's Fancy*, surveyed for *John Moale* on the 1st of November 1738, different from the land called *David's Fancy*, surveyed for *David Williams* on the 22d of June 1671, and hath not on the plots located those lands in the same way, the

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plaintiff shall not be permitted to give any evidence to the jury, that the two tracts of land have the same location; and that the plaintiff is concluded by the location he hath given on the plots of the tract of land called *David's Fancy*, surveyed for *John Moale*. He further prayed the opinion of the court, and their direction to the jury, that as the plaintiff hath in this cause located the two first lines of *David's Fancy*, surveyed for *John Moale* the 1st of November 1738, running from the black letter A, then with the black broken and dotted lines No. 1 and No. 2, to the black letter b, and hath given no other location thereof on the plots, the plaintiff is not permitted to give in evidence any other location of the two first lines of that tract; but that the plaintiff is precluded from setting up under the plots in this cause any other location of the two first lines.

Shaaff and *Harper*, for the Defendant, contended that the plaintiff ought not to give proof different from his allegations. They cited *Hammond vs. Norris*, *(ante* 130.*)*

Martin, (Attorney General,) and *Key*, for the Plaintiff, cited *Carroll et al. Lessee vs. Norwood*, 1 *Harr. & Johns.* 167. *Gray et ux. Lessee vs. Amos*, in the General Court at October term 1796, where the plaintiff located his pretensions three ways, neither of which the jury found, although their finding was in favour of the plaintiff, and included more land than he claimed. He took judgment for the land claimed by him within the finding of the jury, and entered a release as to the residue. *Darnall's Lessee vs. Goodwin*, 1 *Harr. & Johns.* 282. *Hicks vs. Scott*, in the General Court, on the E. S. *Nicholson vs. Hemsley*, 3 *Harr. & M'Hen.* 409, where dotted lines were made on plots by the jury, without objection. *Kirkpatrick vs. Kyger*, 1 *Harr. & Johns.* 298.

Doxe, J. delivered the opinion of the court. The court are of opinion, that as the plaintiff has not located his pretensions co-extensive with the location of *David's Fancy*, the original, surveyed in 1671, he cannot be permitted to give evidence to the jury to extend his pretensions beyond the lines and limits which he has given to the tract of land called *David's Fancy*, under the escheat grant to *John Moale* in 1738, but is estopped by that location from going beyond the black letter V, from whence he must run to the

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head of *Howard's* Branch, at whatever point the jury may find the same to be agreeably to the plaintiff's location of his pretensions, and the location by which the defendant has taken defence.

The court are further of opinion, that the plaintiff shall not be permitted to give any evidence of the two first lines of *David's Fancy*, surveyed for *John Moale* the 1st of November 1738, running otherwise than as they are located from the black letter A on the plots, with the black broken and dotted lines No 1 and No. 2, to the black letter b, as the location of his pretensions; but that the plaintiff is not precluded from giving evidence of any other lines as the two first lines of *David's Fancy*, the original, by way of illustration; and that the plaintiff may support the location of his pretensions, so far as he can show that the same are located within the limits of the original tract of land called *David's Fancy*.

4. The Plaintiff then prayed the opinion of the court, and their direction to the jury, that from the place where the jury find the termination of the second line of *David's Fancy*, the original, the third line thereof must run the number of perches expressed in the grant, and cannot, in its length, be increased or diminished, unless proof is made of the tree called for, or the place where it stood.

Done, J. The court direct the jury according to the plaintiff's prayer.

5. The plaintiff then prayed the opinion of the court, and their direction to the jury, that from the place where the jury find the termination of the third line of *David's Fancy*, the original, they are competent to run the fourth line thereof to the head of the branch called for at the letter r, the gum tree, or at black letter F, or at any point between; and that the plaintiff is competent to recover so far as his pretensions are included within the lines of *David's Fancy*, the original, as found by the jury.

Done, J. The Court do not think the last prayer is embraced within the decision of the court already given.

The Court are of opinion, that the fourth line of *David's Fancy*, the original, must run from the place where the jury shall find the termination of the third line, a straight

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line to the head of the branch. That the course in the certificate, and the course located, is but one line.

6. *The third bill of exceptions.* The defendant produced and swore *Zachariah Maccubbin*, as a witness to the jury, to prove, and who did prove, that *Richard Moale*, under whom the lessors of the plaintiff make title, and *John Eager Howard*, the defendant in this cause, employed *Maccubbin* to run the tract of land called *David's Fancy*, that they both attended at times during the survey, and that on said running, the fourth line of the land was run course and distance. by and with the leased lands of *Moale*, to a point on *Howard's* Branch, to or near a gum tree located on the present plots returned in this cause at the little letter *r*, at the instance of *Moale*, in order to show the true location of that line. The plaintiff then produced to *Maccubbin* a plot of the land called *David's Fancy*, and proved by him that the said plot was the one which he made out for *Moale*, on the running so made; that the same now produced was the original plot, by the witness made out for, and at the instance of *Moale*. He further proved, that the lines on this plot are actually located on the plots in this cause made; and further proved by *Maccubbin*, that after the same running he also made out a plot for the defendant. He then offered to read in evidence the plot so made out by *Maccubbin* for *Moale*. The defendant further proved by *Maccubbin*, that the corrected lines on the plot were never run on the ground, and that the plot was made out after the survey, at the instance and direction of *Moale*, and that the corrected lines of the plot were drawn upon the plot at the sole direction of *Moale*, without the knowledge, and in the absence of the defendant. *Maccubbin* further proved, that he has no recollection whether he did or did not run any of the lines of *Upton Court*, which are laid down on the plot, and that the whole plot, and all the explanations, were made in the office of *Maccubbin*, in the absence of the defendant; and that *Moale*, during the time he was employed in making the plot and explanations, frequently was present, and gave him directions about the work. *Maccubbin* further proved, that the four lines terminating at black letter C, were never run on the ground, and that those lines never were laid down on the plot by the direction or with the knowledge of the defendant, or in his presence; but that the

waters and branches, designated on the plot, were made by actual survey. The defendant then objected to the reading the plot and explanations to the jury.

Shaaff, for the Defendant, cited *Jarrett vs. West*, 1 *Harr. & Johns.* 501.

Done, J. The court are of opinion, that as evidence has been given by the defendant of the runnings of the land, it is proper that the plot should go to the jury, for them to judge of the effect of it in the present question.

The court do not say whether it would have been evidence originally had it been offered, but as the defendant had offered evidence by the witness, who made the survey, to show *Richard Moale* did not claim, it is proper the plot should go to the jury.

The court are therefore of opinion, that the plot and explanations are admissible evidence in the cause, and they are permitted to be given in evidence to the jury. They were accordingly given in evidence to the jury. The defendant excepted.

7. The defendant then prayed the opinion of the court, and their direction to the jury. That the *twelfth line* of *Upton Court* must run as nearly as possible according to the course and distance thereof, as expressed in the original certificate and patent of that tract, so as to strike the branch called for at the end of that line.

Done, J. The Court are of opinion, and so direct the jury, that the course and distance in a certificate or grant must always be controled by a call expressed in the same; and that in this case the course and distance must be complied with, as nearly as they can, to strike the branch described to be at the end of the twelfth line of the tract of land called *Upton Court*, as the jury may believe the said branch to have existed at the time of the survey of the said land; subject also to the opinion of the jury as to the variation of the compass on the said line.

8. *The fourth bill of exceptions.* The plaintiff then read in evidence, the certificate of a tract of land called *Oliver's Range*, made on the 26th of January 1722-3, for *Thomas Cromwell*, in virtue of a special warrant of resurvey to him granted, to resurvey the tract called *David's Fancy*, grant-

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ed to *David Williams* on the 1st of May 1672, for 100 acres; whereby was resurveyed for *Cromwell*, the said land, with contiguous vacancy added, &c. "lying on the N side of *Patapsco* river, and on the W side of the Middle Branch, beginning at a bounded locust stump standing near the said branch, said stump being a boundary of a parcel of land called *Upton Court*, and running thence with said land E 65 perches, still with said land N E 230 perches, to the N W branch, then N N W 86 perches, thence S W by W 70 perches, thence W N W 34 perches, to a bounded white oak of *John Howard's* land, called *Timber Neck*, standing in a small fork descending into the head of *Howard's* Branch, thence with the said land S W by W 34 perches, to the head of *Howard's* branch, thence bounding on the said branch S by W 70 perches, still with said branch S 27° W 60 perches, still with said branch S 56° W 70 perches, still with said branch S 50° W 60 perches to the Middle Branch, thence S 20° E 30 perches, thence with a straight line to the said locust stump, containing 183 acres of land more or less," &c. He also offered evidence of ancient runnings of the tract called *Upton Court*, by which the *fourteenth* line thereof was run and extended to the N W branch of *Patapsco* river, and that no land has ever been taken up southward of the black letter *b*, and below the red letter L, except what has been held and possessed under the tract called *Upton Court*, or the land called *David's Fancy*. The defendant then prayed the opinion of the court, and their direction to the jury, that the *second line* of *David's Fancy* surveyed for *David Williams* on the 22d of June 1671, must be terminated at the end of the 150 perches from the beginning, from whence the *third line* of that tract must run according to its course and distance, as expressed in the original certificate and patent thereof, and the *fourth line* from the end of the third line, to the head of *Howard's* branch.

Harper, for the Defendant, cited *Thompson et al. Lessee vs. Brown*, 1 *Harr. & Johns.* 355. *Dallas vs. Stansbury*, (in the General Court May 1801,) *Hammond vs. Ashton*, (*Ibid* May 1797.) *Owings vs. Kelly*, (*Ibid* May 1796.) *Hellen vs. Garretson*, (*Ibid* October 1797.)

Key, contra, cited *Helm's Lessee vs. Howard*.

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DONE, J. This court are bound by the decision in *Dorsey's Lessee vs. Hammond*, which must govern in deciding upon the prayer now submitted. The court are of opinion, that the termination of the second line of *David's Fancy*, surveyed for *David Williams* on the 22d of June 1671, is a matter of fact to be left to the determination of the jury, on the evidence given to them in the cause. The court therefore refuse to give the opinion and direction prayed for by the defendant's counsel. The defendant excepted.

9. *The fifth bill of exceptions.* The plaintiff then gave in evidence, that the *twelfth* line of *Upton Court* terminated at the letter black A, on the plots; that the original tract of land in 1672, called *David's Fancy*, began at the letter black A; that the certificate of *Oliver's Range* began at the letter black A; and that the escheat land called *David's Fancy*, in 1750, granted to *Richard Moale*, began at the letter black A. And further gave evidence to the jury, that the land on each side of the two lines proceeding from the letter black A on the plots, and running down to the N W branch of *Patapsco* river, has been always held, claimed and considered, as *Upton Court* and *David's Fancy*, and that ancient runnings of the said two lines, being the *thirteenth* and *fourteenth* lines of *Upton Court*, were from the letter black A, down to the N W branch of *Patapsco* river. He then read the opinion of the court, and their direction to the jury, contained in the *second* bill of exceptions in this cause. And gave in evidence the admissions of the defendant, and the opinion of the court, that if the tree at the end of the *third line* of *David's Fancy*, the original, therein called for, was lost, and no evidence of where it stood was given, then the third line must be run its number of perches, which number could not be lessened or increased, from the place where the jury should find the true termination of the second line. He also gave in evidence the opinion of the court given on the prayer of the defendant, No. 3. He further gave in evidence, that the true location of the *thirteenth* and *fourteenth* lines of *Upton Court*, and the *first* and *second* lines of *David's Fancy*, the original, are truly located on the plots from letter black A, with the inner black lines 1 and 2, to little black *a*, by the side of the N W branch of *Patapsco* ri-

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ver. The defendant then prayed the opinion of the court, and their direction to the jury, that if they are of opinion from the evidence, that the original beginning tree of *David's Fancy*, surveyed for *John Moale* on the 1st of November 1738, is proved at the black letter A upon the plots, and that the *first* line of the land, as run by the surveyor, and expressed in the certificate and patent thereon issued, was run as described on the plots by the black broken line numbered with the black figure 1; and that the *second* line of the land, as expressed in the certificate and patent thereof, and run by the surveyor, run to the N W branch of *Patapsco* river, at the black letter b on the plots; and that the *third* line of the land, as described in the certificate and patent run by the surveyor, run to the black letter V on the plots; and that the *fourth* line of the land as run by the surveyor, and described by the certificate and patent thereon, run to the head of *Howard's* Branch, at the black letter *i*, and from thence with the meanders of *Howard's* Branch, and to the beginning, that then the certificate, and the patent thereon issued, do not in law operate to pass any land which may be included within the original grant of *David's Fancy*, surveyed for *David Williams* on the 22d of June 1671, except the same may be also included within the metes and bounds of *David's Fancy*, surveyed on the 1st of November 1738, as above described; and that *David's Fancy*, surveyed the 1st of November 1738, does not, by legal operation, convey all the land contained within the original certificate and patent of *David's Fancy*, surveyed on the 22d of June 1671, unless the particular metes and bounds of *David's Fancy*, surveyed the 1st of November 1738, shall also include the same.

Doxe, J. This point has been decided by this court in *Giltings Jun's. Lessee vs. Hall.* The court therefore refuse to give the opinion and direction prayed for by the defendant's counsel. The defendant excepted.

10. *The sixth bill of exceptions.* The plaintiff offered to read the deposition of *Windel Lawrence*, taken under the survey made in this cause. The plaintiff having proved by *Anne Lawrence*, a witness sworn in court, that her husband, *Windel Lawrence*, went on board the *Norfolk* packet, captain *Deagle*, to go to *Norfolk*, about three

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weeks ago *(a.)* He first said that he intended to go to *Alexandria*, but the morning he left *Baltimore*, he informed the witness he would go to *Norfolk*. That when he departed, he said he should stay till the fall. That the witness hath not seen or heard from him since, and that he informed the witness, that if it suited him, he should remove his family there. That he is a brick-maker by trade. That the witness and his family, consisting of five children at this time, live in *Baltimore*. The plaintiff also proved by another witness, *John F. Holland*, that about the 15th of May 1804, he settled with *Windel Lawrence*, when he informed the witness that he owed some money; that he must go away if the witness did not supply him. The witness told him that he would, but that he lost so much time by attending as a witness at *Annapolis*, that he could not advance him any further sum. That *Lawrence* left the employ of the witness on the 16th of May 1804, and hath not returned since. That *Lawrence* had been in his brother's employ for 2 or 3 years previous. That it is the general reputation of the neighbourhood, that he has left the state, and gone to *Norfolk*, to work at the brick-making business. The plaintiff also proved by another witness, *Joseph Robinson*, that he the witness is acquainted with *Lawrence*, that he informed the witness, at first, that he intended to go to *Alexandria*, but afterwards told him that he was going to *Norfolk*, to work at his trade. That this conversation happened sometime about the early part of May 1804, and that he the witness hath not seen him since. That he left the employment of *Holland* and *Ensor*, in *Baltimore*, where the witness worked with him. The defendant objected to the reading of the deposition in evidence to the jury.

Done, J. The court are of opinion, that the deposition of *Windel Lawrence* is competent and legal evidence to be read to the jury.

This is different from the case of *Darnall's Lessee vs. Goodwin*. There, the deposition was not in the same suit, nor had the witness been in the state for a length of time. Here, every means has been used to obtain the attendance of the witness, and it is in proof that he is out of the reach of the process of the court. The defendant excepted.

(a) The trial commenced on the 5th of June 1804.

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11. *The seventh bill of exceptions.* The plaintiff then prayed the opinion of the court, and their direction to the jury, that although *David's Fancy*, the original, is located by the plaintiff from A on the plots, with an allowance for variation amounting to six degrees and an half of a degree; and though *David's Fancy*, the escheat patent, is located from the same place, with an allowance of three degrees and one quarter of a degree for variation, the jury are not bound by the variation thus allowed, but may find the true location to be by a greater or less variation, as shall appear to them proper from the evidence in the cause.

Martin, (Attorney General,) for the Plaintiff, cited *Esp.* 490.

Shaaff and *Harper*, contra, cited *Hammond vs. Norris*, (*ante* 130.)

Done, J. The court are of opinion, and so direct the jury, that they may, agreeably to the evidence given in this cause, find the true location of *David's Fancy*, under the escheat patent, by a greater or less variation of the compass, as shall appear to them proper from the evidence; provided that by such allowance of variation they are not to enlarge or extend the pretensions of the plaintiff beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V to the head of *Howard's* Branch, wherever the jury shall find the same to be. The plaintiff excepted.

12. *The eighth bill of exceptions.* The court having given their opinion and direction to the jury, in the *seventh* bill of exceptions, that the plaintiff had made title to the land called *David's Fancy*, according to the locations thereof, under and in virtue of the certificates and patents; and the court having determined that the jury might, agreeably to the evidence given, find the true location of *David's Fancy*. under the escheat patent, by a greater or less variation, as should appear to them proper from the evidence; provided that by such allowance of variation they were not to enlarge or extend the pretensions of the plaintiff beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V to the head of *Howard's* Branch, wherever the jury should find the same to be; the plaintiff prayed the opini-

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on and direction of the court to the jury, that if the jury are of opinion, from the whole of the evidence, that the true location of the original tract called *David's Fancy*, and the escheat tract also called *David's Fancy*, runs from black A, with the inner black lines No. 1 and No. 2, to black *a*, by the side of the N W branch of *Patapsco* river, and from thence to black figure 3, on the plots, and from the figure 3 to such point or place as they may find from the evidence to be the head of *Howard's* Branch, that then the plaintiff is entitled to recover the whole of his pretensions located on the plots, which shall lay within the location found by the jury, and is not obliged to abandon any part of his actual located pretensions, by drawing a straight line from V to such place as the jury shall establish to be the head of *Howard's* Branch.

Done, J. The court are of opinion, that the plaintiff cannot recover any land in this action which shall be found to lie without and beyond a straight line to be drawn from the letter V to the head of *Howard's* Branch, wherever the jury shall find the head of that branch to be, although those lands shall lie within the lines of *David's Fancy*, according to the true location, as so found by the jury, and also within the lines of the plaintiff's pretensions, as at present located upon the plots. The plaintiff excepted.

13. *The ninth bill of exceptions.* The plaintiff then prayed the opinion of the court, and their direction to the jury, that if he is *estopped* from showing the true location of *David's Fancy*, the escheat, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also *estopped* from saying that the true location is different from the location given by the plaintiff.

Martin, (Attorney General,) and *Key*, for the Plaintiff, cited *Com. Dig.* tit. *Estoppel*, (B) (C.) *Brereton vs. Evans*, *Cro. Eliz.* 700. *Ludford vs. Barber*, 1 *T. R.* 86. *Co. Litt.* 352, a. *Gray et ux. Lessee vs. Amos*, (October 1796.)

Done, J. The court are of opinion that the doctrine of estoppel does not apply to the present question It is doubtful whether estoppel can be brought at all into view

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in the case. The court refuse to grant the prayer. The plaintiff excepted.

The jury returned the following verdict: The jury find the true location of *David's Fancy*, the original, and *David's Fancy*, the escheat, to be from the beginning at black *A*, as described upon the plots in this cause returned, then with the inner black lines 1 and 2, to little black *a*, on the north west branch of *Patapsco* river, and from the said *a*, the jury find the third line to run to figure black 3, and from thence the jury find the fourth line runs to four perches below big black *F*, which the jury find the head of *Howard's* Branch, and from thence, with *Howard's* Branch and the *Middle* Branch, binding on the same, to the beginning at *A*; and the jury find for the plaintiff his pretensions from the said *A*, with lines 1 and 2, to *a*, and from thence to *V*, and from *V* to four perches below big *F*, which the jury find the head of *Howard's* Branch, and with the same, binding on the branches to the beginning; and that the defendant is guilty of the trespass and ejectment complained of in the declaration, within the said pretensions, in the manner complained of by the plaintiff. And as to the residue of the trespass and ejectment complained of in the residue of the tract of land called *David's Fancy*, for which the defendant hath taken defence upon the plots returned in this cause, the jury find the defendant is in no wise guilty thereof. Judgment—That the plaintiff recover against the defendant his *several terms* aforesaid yet to come and unexpired, of and in all that part of the said tract of land called *David's Fancy*, in the declaration mentioned, lying, &c. which is contained within the description and finding of the jury, that is to say, beginning at black *A*, upon the said plots in this cause returned, and running with the inner black lines 1 and 2 to little black *a*, on the north-west branch of *Patapsco* river, and from thence to *V*, and from *V* to four perches below big *F*, the head of *Howard's* Branch, and with the same, binding on *Howard's* Branch and the *Middle* branch, to the beginning—and also for costs. As to the residue, &c. judgment for the defendant. The defendant appealed to this court.

The cause was argued at the last term before Tilghman, Buchanan, Nicholson, and Gantt, J. on the *first*, *second*, *third*, *fourth*, *fifth*, and *sixth* bills of exceptions, taken by the defendant below.

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Harper, *Shaaff* and *Taney*, for the Appellant, stated, that the *first* bill of exceptions embraced three points—1. Whether the Lord Proprietary be not *estopped* by his grant of *Lun's Lot* as to all such parts of *David's Fancy*, (the original,) as are included within the true location of *Lun's Lot?* 2. Whether the entail created by the patent of *David's Fancy*, (the escheat,) be docked by the deed of bargain and sale to *Croxall?* 3. Whether, admitting these two points to be determined in favour of the plaintiff below, any estate in the escheat land passed to the lessors of the plaintiff by the will of *John Moale*, it not appearing that *John Moale* entered or died seized?

On the *first* point they cited *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 121. *Russell's Lessee vs. Baker*, 1 *Harr. & Johns.* 71. 2 *Blk. Com.* 295. *Co. Litt.* 47, b, 352, a. 10 *Vin. Ab.* 471, 482, 485. *Fairtitle vs. Gilbert*, 2 *T. R.* 171. *Hayne vs. Maltby*, 3 *T. R.* 441. 4 *Com. Dig.* tit. *Estoppel*, 80, 84. 10 *Vin. Ab* tit. *Estoppel*, (B. a.) *Co. Litt.* 47, a, 363, b, 366, b; and *The Attorney General vs. Anderson*, 1 *Harr. & M'Hen.* 219.

On the *third* point they cited 5 *Bac. Ab.* tit. *Verdict*, (D.) *Mahoney vs. Ashton*, 1 *Harr. & M'Hen.* 210. *Stat.* 32 *Hen.* VIII, *ch.* 1. 5 *Bac. Ab.* tit. *Wills and Testaments*, (D. 1.) *Stat.* 34 *Hen.* VIII, *ch.* 5, s 3, 5. *Wallis vs. Fletcher*, *Cro. Eliz.* 530. *Ingram vs. Tothill*, 1 *Mod.* 217. *Bunter vs. Coke*, 1 *Salk.* 238. 2 *Bac. Ab.* tit. *Legacies and Devises*, (B) 51, 52. 2 *Blk. Com.* 310, 209. 227, 228. 312, 323, 332, 338, 375; and 2 *Bac. Ab.* tit *Descents*, (C) 30.

That on the *second* bill of exceptions two questions arise —1. Whether the escheat patent does, by operation of law, relate to the original patent? 2. Whether the expressions used in the original patent of *David's Fancy* do, by operation of law, bind its *second line* on the *fourteenth line* of *Upton Court?*

As to the *first* question, they cited *The Attorney General vs. Snowden*, 1 *Harr. & Johns.* 332. *Ratcliffe's* case 8 *Coke.* 40. *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 2 *Blk. Com.* 244. *The Attorney General vs. Anderson*, 1 *Harr. & M'Hen.* 219; and *Litt. Sect.* 348.

As to the *second* question, they cited *Helm's Lessee vs. Howard*, 2 *Harr. & M'Hen.* 57. *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 190; and *Davis's Lessee vs. Batty*, *Ibid* 264.

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That on the *third* bill of exceptions, the question was, whether a plot in which the defendant below had nothing to do, of the making of which he was ignorant, and which was made for and under the direction of *R. Moale*, under whom the lessors of the plaintiff claim, could be given in evidence against the defendant, merely because it was in part founded on a survey made at his instance and that of *R. Moale?* They cited *Anonymous*, 1 *Stra.* 95. *Bull. N. P.* 247, 248; and *Bridgman vs. Jennings*, 1 *Ld. Raym.* 734.

That on the *fourth* bill of exceptions two questions arise —1. Whether the termination of the *second line* of *David's Fancy*, (the original,) be not a question of *law* for the decision of the court? 2. Whether the true legal construction of the patent of *David's Fancy*, (the original,) be not to terminate its *second line* at the end of 150 perches?

On the *first* of these questions they cited *Gibson's Lessee vs Smith*, 1 *Harr. & Johns.* 253. *Gittings's Lessee vs Hall*, (on appeal in this court.) *Dorsey's Lessee vs. Hammond.* 1 *Harr. & Johns.* 190.

On the *second*, *Gittings's Lessee vs. Hall*, (on appeal in this court.)

That on the *fifth* bill of exceptions, the question was, whether the location of the escheat patent of *David's Fancy* be not independent of the location of the original, except so far as the lines of the former expressly call to bind on those of the latter? They cited *Helm's Lessee vs. Howard*, 2 *Harr. & M'Hen* 57. *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 190. *Howard's Lessee vs. Cromwell*, *Ibid* 118; *and Hawkins vs. Hanson*, 1 *Harr. & M'Hen.* 523.

That on the *sixth* bill of exceptions two questions arise. 1. Whether a deposition taken on the survey could be read in evidence, unless it appeared that the witness was dead, or removed to a foreign country? *Whether a mere temporary* absence be sufficient? 2. Whether in this case the plaintiff below be not precluded by his neglect from the benefit of this testimony? They cited *Darnall's Lessee vs. Goodwin*, 1 *Harr. & Johns.* 282; and 1 *Loffi's Gilb.* 60.

That three questions arise upon the record, independent of and unconnected with the bills of exceptions—1. That the death of one of the lessors of the plaintiff, since the action was brought, and suggested after the jury were sworn,

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makes the proceedings erroneous. 2. That the finding of the jury is uncertain; and 3. That the judgment is entered to recover all the several terms stated in the declaration, including the term on the demise of the lessor, whose death was suggested.

In arguing the *first* and *third* questions they cited *Howard's Lessee vs. Gardiner*, 3 *Harr. & M'Hen.* 98. The acts of 1785, *ch.* 80, and 1801, *ch.* 74, *s.* 38. *Com. Dig.* tit. *Abatement. Aslin vs. Parkin*, 2 *Burr.* 667, 668. *Parker vs. Harris*, 1 *Salk.* 262. *Henriques vs. Dutch West India Company*, 2 *Stra.* 808. *Lampen vs. Hatch*, *Ibid* 934. *Frederick vs. Lookup*, 4 *Burr.* 2021; and *Cuming vs. Sibly*, *Ibid* 2490.

As to the *second* question they cited *Bac. Ab.* tit. *Verdict*, (Q.) and *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 14.

Johnson, (Attorney General,) *Key*, *Mason* and *Martin*, for the Appellee, on the *first* bill of exceptions cited, as to the *first* point, 1 *Pow. on Cont.* 152, 160. *Co. Litt.* 45, a, 47, b, 352, a, 363, b. 2 *Blk. Com.* 245, 346. 10 *Vin. Ab.* tit. *Estoppel*, 433, pl. 1; 461, pl. 3; 463, pl. 22, pl. 26; 475, pl. 4; 476, pl. 1. *Goodtitle vs. Morse*, 3 *T. R.* 365. 3 *Com. Dig.* 271; and *Pickett vs. Dowdall*, 2 *Wash. Rep.* 106. As to the *second* point, they cited *Calvert's Lessee vs. Eden*, 2 *Harr. & M Hen.* 279. And as to the *third* point they cited *Lux's Lessee vs. Pellett*, 1 *Harr. & Johns.* 83. *(note.)* *Taylor vs. Horde*, 1 *Burr.* 60. 16 *Vin. Ab.* tit. *Possession*, 455, pl. 1 *Smith vs. Stapleton*, 1 *Plowd.* 431. *Moore*, 214 *Deux vs. Jefferies*, *Cro. Eliz.* 352; and *Sacheverel vs. Bognott*, *Ibid* 356.

On the *second* bill of exceptions, they cited as to the *first* question, 2 *Blk. Com.* 244, 245. *Burgess vs. Wheate*, 1 *W. Blk. Rep.* 146, 163, 166. *Co. Litt.* 215, b; and *The State vs. Reed*, 4 *Harr. & M'Hen.* 6. And as to the *second* question they cited *Dorsey's Lessee vs. Hammond*, and *Gibson's Lessee vs. Smith.*

On the *fourth* bill of exceptions they cited *Dorsey's Lessee vs. Hammond.*

On the *fifth* bill of exceptions they cited *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 14. *Tolson's Lessee vs. Lanham*, *(ante* 174;*)* and *Gittings's Lessee vs. Hall*, (on appeal in this court)

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On the *sixth* bill of exceptions they referred to the acts of July 1721, *ch.* 14, and July 1779, *ch.* 8. *Stevenson vs. Myers*, 1 *Harr. & Johns.* 102. *Gilb. L. E.* 60. 1 *Lofft's Gilb.* 214, 218; and *Fry vs. Wood*, 1 *Atk.* 445.

On the alleged errors in the record they cited, on the *first* and *third* points raised, *Far vs. Denn*, 1 *Burr.* 362, 363, 364. *Oates vs. Brydon*, 3 *Burr.* 1897. *Runr. Eject.* 411, 413, 414, 438, 439. *Addison vs. Oatway*, 1 *Mod.* 252. *Anon.* 1 *Salk.* 260. *Bull. N. P.* 98. *Thrustout vs. Grey*, 2 *Stra.* 1056. *Fairclaim vs. Shamtitle*, 3 *Burr.* 1290. *Aslin vs. Parkin*, 2 *Burr* 667. 1 *Bac. Ab.* tit. *Abatement*, (F.) And as to the *second* point they cited *Cottingham vs. King*, 1 *Burr.* 628, 629, 630. *Carroll et al. Lessee vs. Norwood*, 1 *Harr. & Johns.* 186. *Darnall's Lessee vs. Goodwin*, *Ibid* 284. *Sullivane vs. Seagrave*, 1 *Stra.* 695. *Camell vs. Clavering*, 2 *Ld. Raym.* 789. *Bindover vs. Sindercombe*, *Ib.* 1470 2 *Bac. Ab.* 230, 231, 232; and *Whittingham vs. Andrews*, 1 *Salk* 255.

Curia adv. vult.

The Court, (at this term,) concurred in the opinions of the General Court, as contained in the several bills of exceptions taken on the part of the defendant in that court, and were of opinion, that there was no error either in the judgment or in the record of proceedings.

Nicholson, J. I am for affirming the judgment upon all the bills of exceptions; also upon the alleged uncertainty of the verdict and judgment; also for the alleged error as to the death of *Richard H. Moale.* I am decidedly of opinion, that the death of the plaintiff's lessor does not abate a suit in ejectment. In affirming the judgment of the general court, upon the *first* bill of exceptions, I wish it to be understood that I do not entertain the most remote idea, that the Lord Proprietary was not liable to be estopped, as other individuals are, or that he had any other of the *incidental* prerogatives of the Kings of *England:* he had only such of the *direct* prerogatives as were expressly granted by the charter.

JUDGMENT AFFIRMED.

WILSON'S EX'RS. VS. SLADE, *et ux.*

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Wilson vs. Slade.

APPEAL from the General Court. Debt on the same bond as in the case of the present appellees and *Morgan*, *(ante* 38.) In this case there were the same pleadings as in that case, with the additional plea of *plene administravit*, and the general replication thereto. At the trial, at October term 1803, the plaintiffs, (now appellees,) offered no evidence of any assets which had come from *John Wilson*, deceased, the defendants' testator, to the hands or possession of the defendants; but contended for, and prayed the opinion of the court, and their direction to the jury, that on the plea of *plene administravit* it was not necessary for the plaintiffs to show that any assets had come to the hands or possession of the defendants; for that the plea was, unless the defendants proved the contrary by the production of the inventory, or by other evidence, an admission of assets to the amount of the plaintiffs' claim. The Court, [*Done* and *Sprigg*, J.] gave the opinion and direction, on the authority of the case of *Slade and wife* against *Morgan*. The defendants excepted, and the verdict and judgment being against them, they appealed to this court.

On the issue joined to a plea of *plene administravit*, the plaintiff did not offer evidence of any assets which had come to the hands of the defendants, (the executors,)—*Held*, that it was necessary for the plaintiff to show that assets had come to the hands of the executors, and that the plea was not an admission of assets to the amount of the plaintiff's claim, although the executors did not prove the contrary by the production of the inventory, or by other evidence

Johnson, (Attorney-General,) and *Magruder*, for the Appellants.

Martin, *Hall* and *T. Buchanan*, for the Appellees.

THE COURT *reversed* the judgment of the General Court, upon the same grounds as in the case of *Morgan vs. Slade, et al.* (*ante* 38,) and awarded a *procedendo*.

JUDGMENT REVERSED.

JONES *et al.* VS. JONES.

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APPEAL from a decree of the Court of Chancery. The bill, filed on the 29th of July 1799, by the appellants, as complainants, states, that *Susanna Jones*, mother of the complainants and defendant, being seized in fee tail of a tract of land in *Saint Mary's* county, called *The first and second parts of Pountney's Oversight*, and desirous that the same, on her death, should descend to all her children equally, or be subject to her disposition by will, did by

A deed of conveyance, executed by a tenant in tail, and not enrolled within the time prescribed by law, but enrolled thereafter, and after the death of the tenant in tail, under a decree of the court of chancery for that purpose, cannot operate against the issue in tail.

The court of chancery cannot decree that a deed of conveyance, executed by a tenant in tail, may be recorded after the expiration of the time limited by law for the recording of deeds—an estate tail not being within the provisions of the act of 1785, *ch* 72, *s* 11.

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deed of indenture, in due form of law, executed and acknowledged, together with *Mathias Jones*, her husband, on the 13th of July 1797, bargain and sell the same to *Benjamin Williams*, for the use and behoof of *Mathias*, her husband, during his life, then to the use of *Susanna* during her life, and from and after her decease to the use and behoof of such person or persons, and for such estate, and subject to such provisos, &c. as she, *Susanna*, by any deed, &c. or by her last will and testament, to be by her duly executed, should give, grant, limit or appoint, and for want of such appointment, or until such appointment, to the use and behoof of *Susanna*, and her heirs, for ever. Shortly after the execution of this deed, it was placed by *Susanna* in the hands of her husband, to be recorded; and within six months from the execution of the same *Susanna* was taken ill, and in order to carry into effect the power given by the deed to her to make a will, she sent for a person to write her will, and gave directions for the land to be equally disposed off amongst all her children, but before the same could be formally done, she became incapable of executing it, and died in a short time thereafter. On her death, *Mathias*, the complainants' father, believing the deed was void, his wife not having been able to dispose of the premises by her will, omitted to have it recorded. That it was owing to the want of information of their father, and his ignorance of the operation of the deed, that he permitted the time to elapse in which the deed should have been recorded, and that it was not owing to any fraudulent design or intention of the party or parties claiming under the deed, that it was not recorded agreeably to law. That their father was also seized in fee in his own right, of a considerable real estate in the said county; that he entertained doubts whether the land mentioned in the deed was actually entailed on his wife, or was her's in fee simple, but on being fully made sensible the same was entailed, and that the deed would have been effectual to dock the entail, though recorded after his wife's death, by which means the land would have descended equally, he, in order to do justice to his younger children, resolved, that unless the defendant would relinquish his claim by primogeniture, and place his brothers and sisters in the same situation with himself, to convey all his own estate amongst the younger children to the exclusion of the

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eldest; but that from sudden indisposition, and a hasty death, the father was prevented from effectuating his determination; and that by his death intestate, his estate descended equally amongst all his children, by which the eldest son, the defendant, claims the whole of the mother's, and an equal share of his father's estate. *Prayer*, that the deed may be recorded, &c. The defendant *demurred* to the bill.

Hanson, Chancellor, (December 16, 1803.) It has, on a former occasion (*a*), been determined by the general court, on a case submitted, that a deed executed by a tenant in tail, and not recorded within six months, but recorded after the tenant's death under a decree of this court, should not operate against the issue in tail. This being the case, the party claiming under the deed, has not a title to the land, and therefore the chancellor conceives, that he cannot, with propriety, decree the recording of the deed.—*Decreed*, that the demurrer in this cause filed be allowed and ruled good, and that the defendant be hence dismissed, but without costs, the chancellor deciding merely on the opinion of the general court, in a single instance given, and never affirmed by the court of appeals.

The chancellor here takes occasion to observe, that he always decides according to the known opinion of the court of appeals, or that of the general court, where the court of appeals has given no opinion; but that there ought to be a distinction between the decision of the court of *dernier resort*, and of a court below. The chancellor knows not but that this suit is instituted for the purpose of obtaining the opinion of the court of appeals. From this decree the complainants appealed to this court.

The cause was argued before Chase, Ch. J. Tilghman, Buchanan, Nicholson and Gantt, J.

Key, and *Johnson* (Attorney-General,) for the Appellants, referred to the acts of 1773, *ch.* 1, and October 1782, *ch* 23. *Laidler vs. Young's Lessee*, *(ante* 69.) The act of 1785, *ch.* 72, *s.* 11. *Pow. on Dev.* 393. *Wills vs. Palmer*, 5 *Burr.* 2615; and *Hampson vs. Edelen*, *(ante* 64.)

Martin and *W. Dorsey*, for the Appellee, cited 2 *Bac. Ab.* tit. *Estate in Tail*, (D) 553. *Ross vs. Ross*, *Chan.*

(*a*) *Ridgely vs. M'Laughlin*, 3 *Harr. & M'Hen.* 220.

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Co. 171. *Ridgely vs. M'Laughlin*, 3 *Harr. & M'Hen.* 220; and *Todd et ux: vs. Pratt*, 1 *Harr. & Johns.* 465.

CHASE, Ch. J. I am of opinion that the decree of the Chancellor be affirmed, with costs.

It is certainly an established principle, that the heir or issue in tail claims the land *per formam doni*, and does not derive his title to it from the tenant in tail, who in respect of said land is nothing more than the conduit pipe, through which the title to the land is conducted to the issue in tail, whose claim to it is from the donor according to the gift. The land of the heir, or issue in tail, is not liable to the debts of the tenant in tail, nor is he compellable to execute or fulfill any contract made by his ancestor for the sale or conveyance of said land. The issue in tail cannot be barred of his right, but by fine, common recovery, or deed executed according to act of assembly. The deed to bar him must be operative in the life-time of the tenant in tail, for immediately on his death the title of the issue attaches. If the deed had been recorded within the six months, it would have operated by relation, from the date of the deed, and would have barred the issue in the life-time of the tenant in tail.

An estate tail is not within the act of 1785, *ch.* 72, for recording deeds. The petition must be filed against the heir, devisee, executor, or administrator of the granter, and with respect to the land entailed, the heir or issue in tail is neither heir, devisee, executor or administrator.

I have shown he cannot be considered as heir. If the land was devised to him by the tenant in tail, he would not take as devisee, but by a title paramount *per formam doni*, which accrues *eo instante* of the death of the ancestor.

The case of executor or administrator can only relate to estates for years or an estate for the life or lives of others; from all which the conclusion is fair and irresistible, that an estate tail is not comprehended within the act of 1785.

This question was decided by the judges of the general court, on a reference to them by the chancellor, at May term 1794, in the case of *Charles Ridgely, of William, against William M'Laughlin*, (3 *Harr. & M'Hen.* 220.) which decision was adopted by the chancellor, acquiesced in by the parties, and has since been considered as the law.

TILGHMAN, BUCHANAN and NICHOLSON, J. concurred. GANTT, J. dissented.

DECREE AFFIRMED.

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Brogden vs Walker

BROGDEN vs. WALKER'S Ex'r. Legatees and Devisees.

JUNE

APPEAL from a decree of the Court of Chancery. The bill in this case was originally filed on the 6th of August 1801, by the testator of the appellees, in his life-time, and it stated that *Brogden*, having a claim against him for £450 0 11, applied to him by letter dated the 27th of August 1800, to secure the payment of the debt by a mortgage, and again, by letters dated the 30th of March and 26th of May 1801; that the complainant, being willing to secure the payment of the debt, consented to give a deed of trust, or mortgage of his property, to *Brogden*, for that purpose, and by appointment met him at the city of *Annapolis* on the 17th of June 1801, to make the requisite conveyance, and on that day executed to *Brogden* a deed for two tracts of land, the one called *Row Downe*, and the other *Row Downe Security*, containing together 323 acres, and also a bill of sale of all his slaves and personal estate; but he expressly charged that the same were only intended as a security for the debt, and not as an absolute conveyance in fee simple to *Brogden*. That the

The act of 1792, ch. 114. s. 4. directing, "that if a cause in the court of chancery is set down regularly for hearing, or submitted to the chancellor, and one of the parties dies thereafter, and before a decree passed, the cause shall not abate, and the chancellor may decree as if such party were alive," cannot take effect in a cause where there might be a decree for a reconveyance of land, to the party dead, on paying or bringing money into court.

A will containing the following devise viz. "I give and bequeath to my sister E. W. all my real estate during her natural life, and after her decease to my nephew T W, and his heirs, lawfully begotten; but in case my said nephew should die before he arrives to the age of 21, *or* leaving issue lawfully begotten, then, &c. T W arrived to the age of 21 years, and died without issue—*Held*, that the estate tail was docked by the deed from T W to W B, altho' W B was declared to hold the land conveyed, in trust for T W, and tho' claiming under him

A bill in the court of chancery, (which was afterwards, on the death of W, the complainant revived in the name of his executor, legatee and devisees,) charged that B, (the defendant and uncle of W.) committed a fraud in procuring W's execution and acknowledgment of deeds conveying his whole estate, real and personal, variant from those he had agreed to execute; that the deeds were intended only as a security for a debt due from W to B, and not as absolute conveyances in fee simple—Prayer for a discovery, and permission to redeem the property intended to be mortgaged, on paying the debt, and for a reconveyance and other relief. *Held*, without deciding whether or not there was fraud in obtaining the deeds, that the deeds are to be viewed as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an affectionate relation. That it could not be imagined he meant to convey every part of his ample property for the benefit of his kinsman only, and to be absolutely dependant on him for subsistence. The best and fairest construction is, that the deeds were intended to secure to B a debt, which was fulfilling an comparison of the value of the property conveyed. Here then was a resulting trust, or here there was an equity of redemption, or here was a silly intemperate young man, who really did not know what he was about, and who therefore ought to have the protection of a tribunal, whose peculiar duty it is to watch over idiots, lunatics, madmen and fools. If W was actually apprized of the purport of the deeds, yet it may be said that it was sufficient for B to have an ample security for his debt, and to screen his nephew from all imposition which might be attempted by others. *Decreed*, that on payment to B on or before, &c of the sum of money expressed as the consideration in the bill of sale, with interest, &c B should convey, &c to the executor complainant, all the personal property, &c and on payment to B on or before, &c of the sum of money expressed as the consideration in the deed of conveyance, with interest, &c B should convey, &c unto the devisees complainants, and their heirs, according to the will of W, the land which was conveyed by W to B on, &c. But if the complainants should fail to make payments, &c there should be sold, for the payment to B of the said two sums of money, with interest, &c so much of the personal property and land, as should be necessary, &c

Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case

The relief which may have been obtained by a complainant who has died, may be granted to his representatives reviving the suit.

A representative, instituting an original suit, may have the same relief which his ancestor, devisor, testator, &c might have had.

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complainant, being the nephew of *Brogden*, had, at the time of executing the deeds, the most unlimited confidence in his honour and integrity, and not in the least suspecting the purity of his intentions, but on the contrary taking it for granted that the conveyances were deeds of mortgage, or of trust, to secure the payment of the debt, pursuant to the propositions of *Brogden* in that respect, he executed the same without ever seeing them until the moment they were produced by *Brogden* for execution. That he never read the deeds, nor were they read to him, nor had he any knowledge of their contents, except as before stated, and that he executed them under the fullest conviction they were only deeds of mortgage, or of trust, to secure the payment of the debt, as *Brogden* never required more, and had no title or demand whatsoever, for a conveyance in fee simple. That the complainant, in January 1801, attained the age of twenty-one years, and for two years previous had been in the possession of his fortune, which was an ample one, consisting of land, negroes, and stock of all kind, worth at a moderate estimate 6 or 7000£. That coming to his estate at an early period of life, without the ordinary inducements to economy, or with resolution to withstand the temptations of dissipation and extravagance, he had indulged but too freely in the follies of youth, and had been too much addicted to drink, which destructive vice had often incapacitated him for business, and not unfrequently rendered him a dupe to the unprincipled artifices of designing men. That to his utter astonishment, he had lately discovered the deeds to *Brogden* were absolute conveyances, in fee simple, to him, of the property therein mentioned; and that, impressed with the flagrant injustice of the transaction, he immediately applied to him on the subject, and requested him to have the mistake rectified, which he well hoped he would have done without the least hesitation; but *Brogden*, in violation of honour and justice, refused to do it, and to the complainant's surprise, offered to reconvey the personal property, and also to convey to him an estate for life in the land, but positively refused to relinquish his claim or title to the latter in fee simple, alleging that if he did, the complainant would soon dissipate or spend it. That he was prepared, and offered to pay the debt due to *Brogden*, to secure the payment of which the deeds were exe-

cuted, but he wholly refused to take the money, or to reconvey the property, saying he had a conveyance for it, and affected to think he was entitled to it, contrary to the avowed object of the complainant in making the conveyance, the obvious dictates of justice and the established laws of the land. That previous to the conveyances, the complainant had incurred debts to about £1000. which were fairly and honestly due, but which he was incapable to pay, as the whole of his property had been conveyed to *Brogden*. That the complainant's other creditors were pressing him for payment; that they suspected the conveyances were made with the fraudulent intention of cheating them of their honest claims, and have not scrupled to represent the transaction as such, which, to those unacquainted with the real motives of the complainant in making the conveyances, the circumstances afford but too much reason to believe; but he stated that the conveyances were made without any collusion with *Brogden*, or the most distant view of depriving or defrauding any of his creditors of their just demands, which he was willing and desirous to pay, but which he never could accomplish, unless his property was restored to him. That his reputation had sustained a considerable shock, that he was reduced to indigence, and could not obtain credit in the country for a farthing. In fine, that he was a ruined man, unless he could procure relief in this court. *Prayer* for a discovery, and permission to redeem the property intended to be mortgaged, on paying the debt, and for a reconveyance, and other relief, &c. The *answer* stated, that *William Brogden*, the father of the defendant, died intestate on the 1st of November 1770, leaving the defendant his heir at law, by which means all the real estate of his father descended to the defendant according to the then existing laws of this state; but that the defendant voluntarily, on the 18th of May 1775, executed a deed for the lands called *Row Downe*, and *Row Downe Security*, to *John Brogden*, the brother of the defendant, who by his last will, dated the 6th of April 1782, devised the same to his sister *Elizabeth Walker*, the mother of the complainant, during her natural life, and after her decease, to his nephew *Thomas William Walker*, the complainant, and to his heirs lawfully begotten; but in case his said nephew should die before he arrived to the age of twenty-one, or leaving issue lawfully begotten, then the

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real estate should go to his heir at law *William Brogden*, the defendant. That the defendant had a considerable claim against the complainant, who was the sole representative of his mother, amounting to £450, to be paid which said demand, or to secure which, the defendant was anxious, and he admitted, that for that purpose he wrote to the complainant the several letters referred to. That the complainant never did consent to secure the claim by way of mortgage, but after the letters were written and received, he came to the defendant, and voluntarily, and unsolicited by the defendant, proposed to him to give him an absolute conveyance for all his lands and negroes. the names of which he furnished the defendant with, stating it as his desire to convey all his estate, legal and equitable, to the defendant, and assigning it as a reason, that the estate had been originally conveyed by the defendant to his uncle voluntarily; and it was proper that it should go back to the same person; and also that he, the complainant, was surrounded with designing people, whose object was to cheat him out of his property; and that a Mr. *Clagett*, who held adjoining land, had said that he expected to get the land, and intended to live on it. The defendant thereupon appointed the complainant to meet him at *Annapolis*, on the 17th of June 1801. to execute the conveyances. The defendant employed *Richard Ridgely*, esquire, to prepare the conveyances, according to the agreement and proposition of the complainant, and he did accordingly prepare the two deeds referred to. That the complainant, agreeably to his appointment, met at *Annapolis* on the day appointed, quite sober, and called on *Ridgely* for the deeds, and they were delivered to him. That the complainant carried the deeds to the house of *James Muckubin*, esquire, a justice of the peace, and the complainant did there sign, seal and acknowledge, and delivered them to the defendant. That the complainant knew the object of the deeds, and they were designed by him to convey an absolute estate to the defendant. That the deeds were not intended or designed by the complainant or defendant as a security for the payment of any sum of money, or to be in any manner conditional, but were intended and designed, by both the complainant and defendant, to be absolute and unqualified conveyances to the defendant, of all the estate both legal and equitable, of the complainant, in

the property mentioned therein. The defendant denied all fraud, &c.

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Testimony was taken under commissions, which it is not necessary to state.

Hanson, Chancellor, (22d December 1803.) In this cause the complainant applied by his bill for a reconveyance. The cause being set down for hearing, the death of the complainant is suggested, and admitted. The chancellor is now moved to proceed to a hearing and decree under the act of 1797, *ch.* 114. And the question is, whether there can be a decree without further proceedings.

On considering the act of assembly, it appears to the chancellor, that whenever he decrees in a case where one of the parties is dead, it must appear to him that the decree may be effectual. In other words, that he cannot decree with propriety where one of the parties is dead, unless his decree is to have substantial operation. In short, it appears to him that the act is confined merely to cases where money is, by the decree, to be paid or brought in, or the bill to be dismissed instead of money directed to be paid or brought in. Now, supposing the chancellor, in this case, of opinion, that there ought to be a reconveyance on paying or bringing in money—is it possible to conceive that the decree is to order money to be brought in or paid by a person who is not a party to the suit, and the conveyance to be made to the same, or another person, who is not a party to the suit. Now, it is clear to the chancellor, from a view of the act, if a decree takes place under it, that the decree must be between the parties to the suit. For instance, a decree for relief in this case would direct *the deceased* to bring in or pay money, and the defendant to convey to the deceased. The chancellor would suggest, for the consideration of the bar, the question, whether such a decree would not be a mere nullity, except that it would show his opinion, and lay a foundation for another suit, in which the representative of the deceased would be a party? But a bill of revivor would certainly be preferable to a new suit.

The act says, that the decree shall be as effectual as if the deceased were alive, except, &c. There is not a title in the act directing that the decree shall be *for* or *against* a representative to the deceased, who was not an

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original party; but suppose it did so direct, how is the chancellor to know the representative without further proceedings in the cause? Is he to act upon the bare allegation, or on exparte testimony? And if there are to be further proceedings, what can there be better than a bill of revivor? The meaning of the act appears to be merely confined to this—when one of the parties to a suit dies after a submission, or setting down for hearing, the chancellor may decree the payment of money to, or by, the deceased, and it shall give such a claim, as is founded on other decrees for or against the estate of the deceased; but the claim shall not be entitled to a preference. There probably may be some other cases; for instance a decree for recording a deed, where nothing is to be done by the deceased party. The more the chancellor reflects, the more he is confirmed in the opinion he has expressed, and the more he is convinced of the impropriety, and indeed impracticability, of the act having an operation more extensive than he has mentioned.

It does not appear to the chancellor proper to examine a cause merely to see whether he would dismiss the bill, unless the cause be of such a nature that a decree for relief might be effectual. The death of the complainant being suggested, a *bill of revivor* was filed by his executor and residuary legatees and devisees, stating the former proceedings, and the last will of *Walker*, &c. to which the defendant *answered*; in which, among other things, he stated that *Walker*, the testator, was never married, and died without issue; that the land and premises in question were devised and limited over by the will of *John Brogden* to the defendant, in case *Walker* should die before he arrived to the age of twenty-one, or leaving issue lawfully begotten. That he hath been informed, and believes, that *Walker* hath made a last will and testament in the manner stated, but believes the same was obtained from him through artifice and by imposition, and that the same was not executed by him at a time when he was of sound and disposing mind. That he should be able to prove, by several respectable witnesses, that *Walker*, shortly before his death, expressed himself perfectly satisfied with the disposition he had made of his real and personal property to the defendant, the same being made in conformity to his intentions.

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The *commission*, by agreement, was opened for taking further testimony; further testimony was accordingly taken, and returned, which it is also unnecessary to state.

It was admitted that the defendant is the heir at law of *John Brogden*, and that *Rebecca Pinkney*, one of the complainants, was the half and only sister of *Walker*, and that he had no brothers or children.

Hanson, Chancellor, (February Term, 1805.) This is a case of a most delicate nature, in which the chancellor earnestly wished a compromise to take place. On this account it is that he has delayed his decision. He must now proceed to the performance of his duty, in giving such a decree as he deems consistent with, and required by, the established principles of equity.

The complainants pray relief on several different grounds—

1. They say the defendant committed a fraud in procuring *Walker's* execution and acknowledgment of deeds variant from those he had agreed to execute.

2. They say that if even *Walker* was apprised of the contents of the deeds, they ought to be either vacated or controled, on account of the defendant's having practised on an ignorant, imbecile, intemperate young man.

3. They contend, that if both these grounds should fail, and supposing the deeds to be, as they purport to be, deeds of real bargain and sale, the vast inadequacy of price, (£250 current money, the consideration mentioned in each of the deeds,) coupled with the suspicious circumstances disclosed by the evidence, ought to be considered as a foundation for setting them aside, or granting the complainants some other substantial relief.

It is proper for the chancellor, before he proceeds to a final decision, to remark on two points made on the part of the defendant.

It is contended, that *Walker* was a tenant in tail; that as he died without issue, and as *Brogden* was the reversioner in fee, the land must belong to *Brogden*, unless it can be shown that the entail was cut off. And that if the deed from *Walker* to *Brogden*, for conveying the real estate, be vacated, it cannot possibly be considered as having the operation of converting *Walker's* fee tail into a fee simple in *Brogden*, or that, if it has that operation, the fee must remain in *Brogden* to his own use.

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The defendant's counsel has also insisted on that established well known principle in chancery, respecting the weight of an answer, which the defendant has been compelled to make on oath. It is true that the defendant has in his answer expressly denied all fraud and imposition wherewith he is charged, and that there is not a single witness to refute his answer.

As to the first point, the chancellor has not the least doubt, that if even *Walker* had only an estate tail, (which he is satisfied was not the case,) the said estate was completely destroyed by the deed executed to *Brogden*, and that *Brogden*, under the deed, was to hold the land, either to his own sole use, or in trust or by way of pledge or security.

As to the other point, the chancellor conceives, as on other occasions he has declared, that *fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances in the case.* It is certain, that although the defendant has generally denied fraud, he has denied but few of the matters charged in the bill.

But the chancellor does not consider himself under the disagreeable necessity of deciding, whether or not there was fraud in obtaining the deeds. He views the deeds as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an able and affectionate relation. If it could be imagined that he meant to convey every part of his ample property for the benefit of that kinsman only, and to be absolutely dependent on him for subsistence, he must be deemed very little superior to an ideot. Were he alive, and in the place of the present complainants, who is there that would not declare it the duty of this tribunal to save him from the wretched consequences of an act proceeding from madness, folly, or habitual ebriety, &c.

Supposing the intent of the deeds to have been that *Walker* should retain his own property during life, and that afterwards his uncle should have an absolute fee, how different would deeds, properly prepared for that purpose, have been from the deeds executed by *Walker*. How different too, the chancellor must say, would have been the circumstances attending the execution and acknowledgment. The best and fairest construction is, that the deeds were intend-

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ed to secure to *Brogden* a debt, which although greater than *Walker* might have admitted, was trifling in comparison of the value of the property conveyed, and to put it out of the power of the grantor to squander his estate, and become a prey to *designing men*. Here then was a resulting trust, or here there was an equity of redemption, or here was a silly, intemperate young man, who really did not know what he was about, and who therefore ought to have the protection of a tribunal, whose peculiar duty it is to watch over ideots, lunatics, madmen and fools.

The defendant having originally conveyed the land to his brother, from whom *Walker* derived it, most probably thought it justifiable for him to secure a return of it as soon as the miserable days of *Walker* should be ended. Let it be supposed that *Walker* was actually apprised of the purport of the deeds prepared by *Brogden's* attorney, as is contended by *Brogden*—what man of intelligence is there, that will not say that it was sufficient for him to have an ample security for his debt, and to screen his nephew from all imposition which might be attempted by others? Who is there that would say if *Walker* was of sound disposing mind when he made his will, that his will ought not to prevail? And if he was not of sound disposing mind, why was not his will contested?

It has been urged, on the part of the defendant, that the complainants are not creditors; that is to say, it is supposed, that not having paid a valuable consideration for *Walker's* property, they have no claim which ought to be regarded by this court against the legal title vested in *Brogden* by the deeds. No! if *Walker*, during his life, was entitled to relief, his representatives, on every sound principle, are also entitled. When has it ever been decided, by this or any other tribunal, that relief, which might have been obtained by a complainant who has died, shall not be granted to his representatives, reviving the suit? Or, even that a representative instituting an original suit, shall not have the same relief which would have been granted to his ancestor, devisor, testator, &c.

The chancellor repeats, that the decree he is about to make is not grounded on a conviction that fraud was perpetrated by the defendant. He is clearly of opinion, that the complainants are entitled to a decree in their favour on other substantial grounds. *Decreed*, that if the executor

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complainant, shall bring into court on or before, &c. to be paid to the defendant, the sum of £250, with interest from the 17th of June 1801, the defendant, by a good deed, acknowledged and recorded according to law, shall convey, &c. to the executor complainant, all the negroes, &c. And if the devisees complainants, or either of them, shall on or before, &c. bring into court the like sum of £250, with interest as aforesaid, to be paid as aforesaid, the defendant, by a good deed, &c. shall, give, grant, &c. unto the devisees complainants, and their heirs, as tenants in common, to have and to hold to them, and their heirs, to the use or uses mentioned in the last will of the said *Walker*, the land, on the said 17th of June 1801 by the said *Walker* conveyed unto the said *Bregden*, being parts of two tracts, &c. But if the said complainants shall fail to bring into this court the money hereby directed to be brought in on or before, &c. there shall be sold, for the payment to the defendant of the said two sums amounting to £500, with interest, &c. so much of the aforesaid personal property and land as shall be necessary; the personal property being first to be sold. And N. B. is hereby appointed trustee for making the said sale; and the course and manner of his proceedings shall be as follows, &c. The defendant appealed to this court.

The cause was argued before Polk, Buchanan, Nicholson and Gantt, J.

Bisgely, *Key*, *Shaaff* and *Taney*, for the Appellant, contended—1. That the bill is no evidence in the case; it is the allegation of the party in the language of counsel, *not sworn to*.

2. The answer denies expressly all fraud; and there is not such proof against the denial of fraud in the answer, as by the law and usage of the court of chancery entitles the appellees to a decree. *Wekelin vs. Walthal*, 2 *Chan. Ca.* 8. *Company of Pewterers vs. Governor of Christ's Hospital*, 1 *Vern.* 161. *Walton vs. Hobbs*, 2 *Atk.* 18. *Speed vs. Martin*, 2 *Com. Rep.* 588. *Robinson vs. Cuming*, 1 *Atk.* 473; and *Man vs. Ward*, 2 *Atk.* 228.

3. No witness is sworn on the part of the appellees who gives any legal, competent testimony; and neither fraud nor imposition is proved by any legal competent testimony—

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the whole being hearsay or declarations of *Walker* himself.

4. The deeds of conveyance transfer not only a legal, but an equitable estate to the appellant, not impeachable in a court of conscience, and were fairly obtained on a proper and good consideration. *Villers vs. Beaumont*, 1 *Vern.* 101; and *The King vs. The Inhabitants of Scammonden*, 3 *T. R.* 474.

5. If the deeds are declared null and void, as unduly obtained, yet the appellees should not have a decree for the real estate, as in such case it is *entailed property*, not devisable to the appellees by will, and belongs to the appellant as heir at law and remainder-man.

Martin, *Johnson* (Attorney-General,) and *T. Buchanan*, for the Appellees, cited *Clarkson vs. Hanway*, 2 *P. Wms.* 203. *Leathcote vs. Paignon*, 2 *Bro. Chan. Ca.* 167. *Ardglass vs. Muschamp*, 1 *Vern.* 237. *Bennet vs. Vade*, 2 *Atk.* 327. *Chesterfield vs. Janssen*, 2 *Ves.* 125, 155. *Exel vs. Wallace*, *Ibid* 324. *Bridgman vs. Green*, *Ibid* 627. 2 *Pow. on Cont.* 144, 145, 152 to 160. *Osmond vs. Fitzroy*, 3 *P. Wms.* 129. *Cole vs. Gibbons*, *Ibid* 290. *Chew's Lessee vs. Weems*, *(ante* 173, *note;)* and *Frazier's* case, cited in *Owings vs. Reynolds, et al.* at December term, 1810.

DECREE AFFIRMED.

JUNE.

DAVIS'S Lessee vs. DAVIS'S Heirs.

Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person, under whom the plaintiff claimed, died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—— The strongest presumption of a good title, being in favour of the defendant

APPEAL from a judgment of the General Court, rendered in an action of *ejectment* brought by the appellant. The declaration contained a demise for a tract of land called *Brewerton*, containing 400 acres, and one for a tract called *Linham's Search*, containing 38 acres, both lying in *Anne-Arundel* county. There was also a demise for an undivided moiety of the same lands, omitting the quantity of acres contained in each tract. The defendant, (the ancestor of the appellees,) took general defence and issue was joined. The plaintiff, at the trial at May term 1805, read in evidence a grant dated the 7th of September 1659, to *John Brewer*, for a tract of land called *Brewerton*, formerly surveyed for *William Pyther*, lying

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on the west side of *Chesapeake* bay, on the west side of the South river, &c. containing 250 acres. He also read certain entries from the rent rolls; by one of them it appeared that a tract of land called *Pytherton*, was surveyed on the 20th of June 1652, for *William Pyther*, lying on the west side of South river, containing 250 acres, and that it was in the possession of *James Saunders*, for *Parnall's* orphans. By another entry it appeared, that the tract called *Pytherton*, surveyed as above mentioned, was granted to *John Brewer* on the 7th of September 1659, and called *Brewerton*, and that it was in the possession of *Robert Davis*. By another entry it was stated, that the tract called *Brewerton* was resurveyed on the 9th of November 1704, for *Joseph Brewer*, and contained 460 acres, and that the following alienations had taken place, viz. "250 acres. *Robert Davis* from *William Davis* and *William Peacock*, 12th of September, 1744. 100 acres. *Solomon Weeden* and wife from *John Gresham*, 2d of June 1744. 100 acres. *John Iiams* from *Joseph Williams*, 12th of January 1747. 130 acres. *James Maccubbin* from *Ferdinando Brewer*, 12th of October 1747." He also read the grant for *Linham's Search*, issued to *John Linham* on the 12th of June 1688, and containing 38 acres. Also a deed from *William Peacock* and *William Davis* to *Robert Davis*, dated the 12th of September 1744, for *Brewerton* and *Linham's Search*.—He then proved by *John Welch*, aged 76 years, that when he the witness was a boy in the year 1738, he was at the house of *Robert Davis*, who was then married to the defendant *(a)*, and lived upon and possessed the lands for which this suit is brought; that *Davis* always, after his marriage with the defendant, and until his death, lived on the land and possessed the same, and after his death his wife, the defendant, lived upon and possessed the same down to this time, and still does. That he never knew or heard that any person, except *Robert Davis* and his wife, possessed the land, or any part of it, from the year 1738 down to this time. That *Sarah Davis*, the defendant, had two sisters who, together with *Sarah*, were the daughters of *Daniel Paine; Sarah* was the eldest, married to *Robert Davis* as above; *Frances*, the second, married *William Peacock*, who lived with her some years, and died leaving

(a) She afterwards died, and her heirs were made parties.

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her a widow; that she remained a widow two or three years, and married the deponent's brother, with whom she lived two or three years, and died about the year 1750 or 1751, without issue. That *Elizabeth*, the third daughter, remained single several years after he first knew the family in 1738, afterwards married *William Davis*, brother of the above mentioned *Robert Davis*, by whom she had four children, one of them, the eldest, father of the lessor of the plaintiff in this cause; that she died before her husband, but when he does not recollect. That he knew nothing of the title under which *Robert Davis* and his wife, the defendant, held the lands for which this suit is brought, but he had often heard that *Sarah Davis*, and her husband, lived on her father's plantation, and when *Frances* above named, died, she expressed a wish to be buried alongside of her father, and was carried to *Robert Davis's* plantation, the lands for which this suit is brought, and there buried; that *Frances Peacock*, above named, when she married the brother of the deponent, was more than twenty-one years of age. The plaintiff then offered in evidence, by cross examining *William Brewer*, a witness produced and sworn by the defendant, that he the witness was aged about 73 years; that he had been acquainted with the three daughters of *Daniel Paine* above named, ever since he was six years old; that *Paine* had two other daughters, *Priscilla*, who married and left no issue now living, the other *Ann* who died young and unmarried. That he understood *Elizabeth* was the youngest of the five daughters; that he had often heard his father say, that *Daniel Paine* was an *Englishman*, who got the land in question by his wife; that the four daughters were co-heirs, and got the land by inheritance from their mother; that he understood that *Frances* and *Elizabeth* lived in *Calvert* county with a Mrs. *Wilkerson*, a relation, till *Sarah Davis*, her sister, married, when that happened he frequently saw *Elizabeth* the youngest sister at *Robert Davis's*, who lived upon the land, and believes she lived sometimes with her sister *Davis*, and sometimes with her sister *Peacock*, till she *Elizabeth* married *William Davis*. The plaintiff then read certain entries from the parish registers for *All Hallows* Parish, viz. "*Mary*, the daughter of *James*, and *Sary Parnall* his wife, was born the 9th day of April 1697, in the parish of *All Hallows*, and baptized the 25th

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day of July 1698. *Priscilla*, daughter of *Daniel* and *Mary Pane*, was born June 1, 1714. *Mary*, daughter of *Daniel* and *Mary Pane*, was born July 29, 1717. *Sarah*, daughter of *Daniel* and *Mary Pane*, was born May 24, 1720. *Frances*, daughter of *Daniel* and *Mary Pane*, was born August 21, 1722." The plaintiff also proved, that the lands in question are situated in *All Hallows* Parish. He also proved that *Elizabeth*, above named, who married *William Davis*, died about 12 or 14 years ago, leaving four children, *Daniel* her eldest son, *William*, *Robert* and *Mary;* that *William Davis*, her husband, died soon after, about 10 or 12 years ago; that *Daniel*, the son, died in the life-time of his father, leaving seven children, now alive, of which the lessor of the plaintiff is the eldest. The defendant then read to the court a patent granted to *John Brewer* on the 16th of February 1659, for 400 acres of land, called "*Brewerston*, lying on the west side of Chesapeake bay, and on the west side of a river in the said bay, called *Road River*," &c. She also read to the court a patent to *Joseph Brewer* for 460 acres of land, called *Brewerston*, dated the 20th of March 1710. This was a resurvey of the last above mentioned tract, devised by *John Brewer* to his two sons, *William* and *John;* that *John*, the son, devised to *Joseph* his son. She also read an entry in the rent rolls concerning the said lands, viz. "*Brewerston*, patented to *John Brewer* the 16th day of February 1659, lying in *Anne-Arundel* county, on the west side of Road River, and containing 400 acres. On the 20th of March 1710, a patent issued to *Joseph Brewer* for 260 acres of land, lying in *Anne Arundel* county, being a resurvey on one moiety of a tract called *Brewerston*, originally granted to *John Brewer* for 400 acres." She then produced a witness, *William Brewer*, aged about 73 years, who being duly sworn, deposed, in addition to what has been before stated, that ever since he was six years old he was well acquainted with *Robert Davis*, and his wife the defendant; that when he first knew them they lived upon the lands for which this suit is brought, and after the marriage of *William Davis* and *Elizabeth Paine*, before stated, they, *Robert Davis*, and *Sarah* his wife, and no other person whatever, possessed the same, and that they continued so to possess the lands ever after, until *Robert Davis* died, and that after he died, his wife, the defendant,

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continued to do so till this time, and now does, and that he the witness had lived all his life, and still lives, adjoining the lands for which this suit is brought. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they are of opinion from the evidence, that *Daniel Payne* and *Mary Payne* died seized of the lands mentioned in the declaration, and find the facts stated by the plaintiff to be true, yet although they should also be of opinion that the facts stated by the defendant are true, the plaintiff is entitled to recover an undivided interest in the lands in the declaration mentioned.

Key and *Johnson*, for the Plaintiff.

Mason, for the Defendant, cited *Esp.* 459, and *Gilb. L. E.* 103, 104.

CHASE, Ch. J. The facts and circumstances disclosed in evidence are not sufficient for the jury to presume a title in the heirs of *Parnell*, or a deed to *Parnell*, against the defendant, with sixty years possession. The entries on the rent roll should show a correspondent title. The strongest presumption in this case, of a good title, is in favour of the defendant.

The court are of opinion, that the facts stated by the plaintiff, although the jury should find them to be true, are not sufficient and legal evidence to warrant the jury in finding that *Daniel Payne* and *Mary Payne* were seized of the lands, and died seized thereof, in opposition to the facts stated by the defendant, if the jury should find them to be true. The court therefore refuse to give the direction prayed. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this court.

At a former term the death of *Sarah Davis*, the then appellee, was suggested, and her heirs, the now appellees, were permitted to appear, &c.

The cause was argued before TILGHMAN, BUCHANAN, NICHOLSON, and GANTT, J. by

Johnson, (Attorney-General,) for the Appellant; and by *Martin*, *Ridgely* and *T. Buchanan*, for the Appellees.

JUDGMENT AFFIRMED.

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JUNE

Levering vs. Bond's Adm'r

In an action of trover for corn placed in the warehouse of the defendants on storage, and which they refused to deliver, but claimed to retain it for the payment of a debt due to them from the plaintiff for articles sold and delivered—*Held*, that as there was no evidence that the corn was delivered to the defendants, to be applied by them to the discharge of the debt due by the plaintiff to them, or was placed in their hands as factors, with authority to sell the same, the plaintiff was entitled to recover

LEVERING vs. BOND'S Adm'r.

APPEAL from the General Court. This was an action of *Trover*, brought by the appellee. The plaintiff, at the trial at May term, 1805, read in evidence a *receipt* from the defendant, and one *Lemmon*, since deceased, and whom the defendant has survived, in the following words: "*Baltimore*, 27th Nov. Received from Mr. *Robert Spedding*, for account of Mr. *William S. Bond*, eleven hundred and thirty bushels of corn.

Lemmon & Levering."

He also gave in evidence, by the testimony of *Robert Spedding*, the person by whom the corn in the receipt mentioned was delivered, that the delivery was made the 27th of November 1798, that the corn was the property of *William S. Bond*, the plaintiff's intestate, by whom it was delivered to the witness, to be sold for the use of *Bond*; but without any orders or authority to place it in the hands of any other person for sale, in case he could not dispose of it himself. That not being able to sell the corn, he placed it in the warehouse of *Lemmon & Levering*, who were in the habit of receiving produce on storage, but made no particular agreement with them relative to the amount of storage to be paid, and gave them no orders or authority to sell or dispose of the corn. He also gave in evidence, that within a few days after the date of the receipt, and some time in the month of November or December 1798, *Bond* sent a person to demand the corn from *Lemmon & Levering*, in his name, who made the demand accordingly, and informed *Lemmon & Levering* that he was ready to pay the storage, as soon as the corn should be delivered. But that *Lemmon & Levering* refused to deliver it, declaring that they would retain it for the payment of a debt due them by *Bond*. The defendant then read in evidence an *account*, which was admitted in evidence by the plaintiff, for sundry articles sold and delivered by *Lemmon & Levering* to *Bond* and one *Airs*, in which account the corn is credited, and leaving a balance due from *Bond & Airs*, to *Lemmon & Levering*, of £13 9 8. He also gave in evidence, that *Airs*, in the account mentioned, had departed this life before the time of delivering the corn, and that *Bond* was then indebted to *Lemmon & Levering* in the sum of £917 13 4, as by the

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account stated. The defendant then prayed the opinion of the court, and their direction to the jury, that if they shall be of opinion, from the evidence, and all the circumstances in proof, that the corn was delivered to *Lemmon & Levering*, to be applied by them to the credit of *Bond*, on account of the debt due from him to them, or was placed in their hands with authority to sell it as factors, that then, in either of the said cases, the plaintiff is not entitled to recover.

Chase, Ch. J. The court are of opinion, that there is no legal evidence, from which the jury can find that the corn was delivered to *Lemmon & Levering* to be applied by them on account of *Bond* to the discharge of the debt due from him to them, or was placed in their hands as factors with authority to sell the same. The court therefore refuse to give the direction prayed. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The case was argued before Tilghman, Buchanan, Nicholson and Gantt, J. by

Harper, for the Appellant; and by
Martin and *Key*, for the Appellee.

JUDGMENT AFFIRMED.

Hopkins *vs.* Stump, *et al.*

June

Appeal from a decree of the Court of Chancery, *dismissing* the bill of complaint. The bill filed in 1790 charges, among other things, that the defendants, *Stump*

Where a bill had been filed in the court of chancery under which testimony was taken and returned, and the bill afterwards dismissed by the complainant, who filed a new bill against the same defendants to obtain the same relief for which the former bill had been filed—on the petition of the defendant, *Held* by *Hanson*, chancellor, that the testimony so taken in the former suit be received and read in evidence in the new suit

The court of chancery will not enforce a speculating contract for continental money. Per *Hanson*, Chan

An answer to a bill in chancery will prevail, unless refuted by the testimony of two witnesses, or of one witness, with equitable circumstances

If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer *plainly, fully and explicitly* If then, any material matter, charged in the bill, has been neither denied nor admitted by the answer, it stands on hearing of the cause for *taught* Per *Hanson*, Chan.

If A has purchased land from B, and paid for it without receiving a conveyance, or if B holds in trust for A, in either case A has an interest liable to be taken and sold on a *feri facias*, and the purchaser is entitled to the aid of the court of chancery to obtain the legal title. *Ib*

But if A has only contracted and given his bond for the purchase money of a tract of land, and received in return a bond of conveyance—Has A such an equitable interest as is liable to be sold on a *feri facias*, so as to place the purchaser in the room of A? *Ib*

Whether or not land is bound by a judgment, so far, as that if A has a judgment against him, and before execution, A *bona fide* sells his right to B, that C, the plaintiff, may on a *feri facias* take and sell it without inquiring or seeking for other property? *Quere*

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and *Dallam*, being seized in fee of a tract of land situate in *Harford* county, sold a part thereof, (describing it,) to the other defendant, *Patrick*, and gave him a bond for a conveyance thereof to him in fee. That *Patrick*, at the time of purchase, paid a considerable part of the purchase money, and gave his bond for payment of the residue. That when the bond became due, *Patrick* tendered the sum of money therein mentioned to *Dallam*, agreeably to the acts of assembly in such case made, but *Dallam* refused to receive the same. The bill next states, that a judgment was obtained in *Harford* county court against *Patrick*, a *fieri facias* issued thereon, which was laid on part of the land purchased as aforesaid by him; afterwards a *venditioni exponas* issued, and under it the land was sold, and was purchased by one *Pattison* for the complainant, as appeared by the deed of the sheriff executed to the complainant, and accompanying the bill. That under executions, on other judgments against *Patrick*, the residue of the land was sold to the complainant, who received the sheriff's deed. That *Stump* had afterwards received the rents of the land, and after the sales made to the complainant, *Patrick*, with a view of defrauding the complainant, gave up the bond of conveyance to *Stump*. That the complainant had made application to *Stump* for a conveyance of the lands. The bill prays that *Stump* may be compelled to execute to the complainant a deed for the lands. The defendants, *Stump* and *Dallam*, demurred specially to the bill, assigning for cause, that the bill did not contain any matter of equity whereon the court of chancery could ground any decree, or give the complainant any relief or assistance against the defendants.

Hanson, Chancellor, (October term 1800.) The chancellor understands, that by a recent decision of the court of appeals(a), an *equitable interest in lands* may be sold under a *fieri facias*, and that the purchaser stands in the place of the defendant at law. He cannot otherwise than remark, that this decision appears, from transactions in this court and in the land office, agreeable to the opinion of the late Chancellor *Rogers*, as well as of the present chancellor.

(a) *Campbell vs. Morris*, 3 *Harr. & M'Hen.* 535.

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But whether or not the complainant, standing in the place of *Patrick*, is entitled to a decree for vesting in him a legal title, cannot appear, until the matters stated in his bill are admitted, or denied, by the answer; and, if denied, are established by proof. *Decreed*, that the demurrer be overruled, and that the defendants, *Stump* and *Dallam*, who put in the demurrer, be granted time until the third Tuesday of February next to put in their answer to the bill of the complainant.

The defendants answered, and commissions issued, and testimony was taken and returned.

At December term 1803, the defendants, by their petition stated, that the complainant commenced, in the court of chancery, a suit against them for the same cause, and to obtain the same relief for which the present suit had been instituted, and that, in the former cause, it was so proceeded that answers were filed, and a commission issued to examine witnesses, upon which a great number of witnesses were examined, and their testimony returned to the court, and that thereupon the cause was set down for hearing, and the defendants were ready to show that the complainant was not entitled to relief; but the complainant dismissed his bill, and thereby prevented a hearing of the cause. That several important witnesses, whose testimony was returned in the former suit, are dead, and several others removed out of this state to distant parts, so that their testimony could not be had on the commissions issued in the present suit. *Prayer*, that the depositions had and taken in the former suit, so dismissed, shall be received and read in evidence at the hearing of the present cause.

Hanson, Chancellor, was of opinion, that the defendants were entitled to have their prayer granted; and it was accordingly ordered and decreed, that the depositions in the cause heretofore dismissed, and mentioned in the said petition, be received as evidence on the hearing of this cause.

The testimony taken in the former suit was exhibited, &c. and the cause was argued before the Chancellor, by

Scott and *T. Buchanan*, for the Complainant; and by *Martin*, (Attorney General,) *Hollingsworth*, and *Shaaff*, for the Defendants.

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Haxson, Chancellor, (October term 1804.) On considering the bill, answers, depositions and exhibits, &c. it appears to the chancellor, that he cannot grant the prayer of the bill without a violation of several principles in this court established. In the first place, the contract, of which the complainant claims the benefit, is such a contract as this court has again and again said it will not enforce. It was a speculating contract for continental money, which, if *Patrick* the party, instead of *Hopkins*, were complainant, this court would not enforce; and it is impossible for any rational man to conceive, that an assignee, or any person *claiming in the place of the party*, shall be in a better situation than the party himself. But it appears, the idea of the complainant that *Stump*, in whom alone the legal title now is, was willing to perform the contract, and so stipulated, but that arrangements were made to defeat or defraud the complainant. On this subject the complainant called on the defendants for full explicit answers: but the defendants have, by their answers, explicitly denied the chief important matters charged in the bill.

There is no principle better established than this, that if a defendant be compelled to answer, whatever he says on oath shall prevail, unless refuted by the testimony of two witnesses, or of one witness with equitable circumstances. But the testimony in this case is nothing like such a refutation of the answers of the several defendants, notwithstanding the strong pointed charges made by the complainant.

On the demurrer, the chancellor long since decided in the complainant's favour so far as this—the court of appeals having, as he was informed, decided an equitable interest to be liable to a *fieri facias*, the party who has at a sale on a *fieri facias* purchased fairly an equitable interest, is entitled to the aid of this court to give him the legal title. This is the plain meaning of the chancellor's declaration, which however appears to have been misunderstood.

It would seem likewise that the complainant misunderstood the chancellor in another particular. But no person, acquainted with the *laws*, or *rules* or *practice* of this court, would conceive it the meaning of the chancellor, that whatever matter stated in a bill is not denied, must

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be considered as admitted. No! If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer *plainly, fully* and *explicitly*. If then any material matter, charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on hearing of the cause for *nought*. This assuredly every lawyer will admit.

And now let it be inquired, what is that equitable interest which the court of appeals has said is liable to be sold on a *fieri facias?* The chancellor does not fully understand it. But he readily conceives, that if A has purchased land from B, and paid for it, without receiving a conveyance, or if B holds in trust for A, in either case A has an interest liable to be taken and sold on a *fieri facias*, and the purchaser is entitled to the aid of this court to obtain the legal title. But if A has only contracted and given his bond for the purchase money, and received, in return, a bond of conveyance, the chancellor questions, whether A has such an equitable interest, as is liable to be sold on a *fieri facias*, so as to place the purchaser in the room of A. If such be the meaning of the court of appeals, they, in effect, say, that a cause of action or law suit is liable to a *fieri facias*. In short, the chancellor is inclined to think, that the meaning of the court of appeals was, that if A has a *complete* equitable title to land, of which the naked legal title is in B, the land is liable to a *fieri facias* on a judgment against A.

The chancellor cannot conceive, that contracts for land, which may be deemed to confer an equitable interest, are so far bound by a judgment, as that, after the judgment, and before a *fieri facias*, the parties cannot come to a settlement—For instance, A gives his bond to B for $10,000, the price of *Black Acre*, containing 500 acres. B gives in return, his bond to A, in the penalty of $20,000, conditioned for conveying the said land. These bonds are both dated the 1st of January 1800. At May term 1802, C obtains a judgment against A, for $10,000. In November of the same year, A and B agree to vacate the contract, and *afterwards* C takes out a *fieri facias*, is it reasonable to suppose the law to be, that A had an equitable interest, which being bound by the judgment of C, could not be given up; and that although A may have per-

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sonal property, or land, sufficient to satisfy the judgment, C may insist on laying the execution on the *contract?* for laying it on the land is laying it on the contract. No! The impropriety of the idea is glaring. Another doubt—Supposing equitable interests *in*, or mere contracts *for*, land liable to a *fieri facias*, at what *time* are these interests or contracts bound? Are they absolutely bound by the *date* of the judgments? Or are they to be bound in the same manner as personal property is bound, viz. from the time only of delivering the writ to the sheriff? The chancellor has always considered it a most important question, *never decided*, (that he knows of,) whether or not land is bound by a judgment, so far, as that if A has a judgment against him, and before execution A *bona fide* sells his right to B, C the plaintiff may, on *fieri facias*, take and sell it, without inquiring or seeking for other property. The chancellor is not apprized of any decision to this effect, if any such has been. But if such decision has taken place, although he certainly would govern himself accordingly, he could not do otherwise than question its propriety.

In *England*, whose laws we follow, lands were, long since, bound by judgment; that is to say, if A, against whom a judgment is obtained, has land, and, after the judgment, conveys it, the plaintiff may, notwithstanding, affect it by the writ of *Elegit*.

During our connexion with *England*, its parliament passed an act, subjecting lands in *America* to be sold under a *fieri facias*, in the same manner as personal property, to satisfy judgments, obtained by subjects of *Great Britain*. The act did not say a word respecting lands to be bound from the time of the judgment; but it seems, that *most* or many gentlemen of the bar entertain an idea, that although *personal property* is only bound *by the delivery* of the writ, and *lands* are liable as personal property, the lands are bound from the time of the judgment, to be taken by *fieri facias* at any time afterwards. Supposing the law to be so, and supposing contracts, as aforesaid, liable to *fieri facias;* that is to say, that the purchaser under a *fieri facias* is to be placed in the situation of the defendant at law, the nature of *Patrick's* contract is such, that, as the chancellor has already intimated, ought not to be enforced, even if *Patrick* were the complainant, instead of *Hopkins*.

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vs
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The counsel for the defendants has indeed alleged, that the chancellor's decision on the demurrer is grounded on a mistake, and that the court of appeals never has decided an equitable interest to be liable to a *fieri facias*. If the counsel be right, there is an end of the case at once. But the chancellor cannot think that the counsel is right, but laments *that tribunals, whose decisions are to govern other tribunals, do not give their opinions at large on every important point.*

The chancellor, as is his uniform practice, on every important point, has given his opinion pretty much at large. He might still perhaps be more explicit as well as full, but he conceives that he has said enough. *Decreed*, that the bill be dismissed. From this decree the complainant appealed to this court; and on the cause coming on to be argued, and the counsel for the parties declining to argue the case,

DECREE AFFIRMED, NISI.

POE vs. CONWAY's Adm'r.

JUNE.

In *assumpsit* for work and labour, the act of limitations was pleaded—*Held*, that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town he would have the business settled, was sufficient to defeat the operation of the act of limitations.

APPEAL from *Baltimore* county court. *Assumpsit* brought by the appellee on the 7th of April 1801, for work and labour, &c. performed by his intestate for *Poe*, the appellant, on the 4th of September 1798. The act of limitations was pleaded; and at the trial the plaintiff below offered testimony to prove an acknowledgment by the defendant, that the intestate had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town, he would have the business settled. The defendant prayed the court to direct the jury, that this testimony was not sufficient on the pleadings to prevent the operation of the statute of limitations; which direction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

Martin and *Gwynn*, for the Appellant.
Hollingsworth, for the Appellee.

JUDGMENT AFFIRMED.

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Browning vs Magill

The purchasing a horse at a public market established by law for the sale of horses, &c. does not entitle the purchaser to hold the horse against the claim of the true owner.

There is no *market overt* in this state.

Browning vs. Magill.

Appeal from *Baltimore* county court. *Replevin* for a horse, brought by the appellee against the appellant. The defendant below pleaded property in himself, and issue was joined. It was agreed between the parties, that if the jury find the property of the horse, mentioned in the declaration, to have been in the plaintiff previous to the sale below stated, then the judgment shall be for the plaintiff, subject to the opinion of the court, upon the following case: A certain *Samuel Johnson* delivered the horse in question to *Richard Culverwell*, a person duly authorised by the corporation of *Baltimore* to sell horses at public sale. On Wednesday the 26th of March 1799, *Culverwell* sold the horse at the public market of the city of *Baltimore*, in the *market-space* established by law, to *Browning*, the defendant, between the hours of ten and eleven o'clock of the forenoon; Wednesday being the public market day of the said market-space. *Browning* paid *Culverwell* $28 for the horse, fairly and *bona fide*, and without any knowledge that the horse belonged to any other person than the person who had then sold him; and the regular market tolls, and other duties to be complied with agreeably to the regulations of the market in the said sale, were discharged. *Verdict* for the plaintiff; and the court gave judgment on the case stated and verdict, for the plaintiff. From that judgment the defendant appealed to this court.

The case was argued before Tilghman, Buchanan and Gantt, J.

Martin, for the Appellant. The question is how far property in the hands of a *bona fide* purchaser shall be protected? At common law it is clear, that a purchaser of property in public places, markets-overt, is protected. By the custom of *London* every day is a public day for the sale of goods, &c. and the purchaser is protected in his purchase. Every article sold during the hours for selling in shops in *London*, is legally sold, if it is an article usually sold in such shop. It is by the common law, that in every thing sold in market-overt, the purchaser is protected, and it is not confined solely to the city of *London* under the custom of that city. The statute of 21 *Henry* VIII, *ch.* 11, makes an alteration of the common law;

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and if property is stolen, and the thief is prosecuted to conviction, then the party has a right to recover his property from a *bona fide* purchaser. But to recover, he must proceed to the conviction of the thief, and can only recover of him in whose possession the property is at the time of the conviction, even if the owner gave notice of his intention to prosecute the thief. *Horwood vs. Smith*, 2 *T. R.* 750. A purchase at a market-overt, is at such places as are authorised by law for the sale of property. All places where things are commonly sold are markets-overt. A market-overt means nothing more than the place where certain articles are usually sold. The purchaser of property in market-overt, is guilty of no impropriety or laches; but there is laches on the part of the owner of the property who does not keep his property safe and secure from being stolen. It is true, that the stealer of a horse may get him to market sooner than he could most other articles, so that he could not be pursued and taken so soon as he could if he had stolen any other article. Yet there is no distinction by the common law. In 2 *Blk. Com.* 449, the principles are fully laid down, where it is said that property may in some cases be transferred by sale, though the vendor *hath none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end; and therefore the general rule of law is, that all sales and contracts of any thing vendible, in fairs or markets-*overt*, (that is open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein, and for this purpose were tolls established in markets. Market-overt in the country, is only held on the special days provided for particular towns by charter or prescription; but in *London*, every day, except Sunday, is market day. The market place or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market-overt. In *Baltimore* there is no market-overt, except such as is established by law. The same reason which makes every day a market day in *London*, applies to all large towns and cities. In *London*, every shop in which goods are exposed publicly to sale, is market-overt, for such things only as the owner professes to trade in. But if goods are stolen, and sold out of

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market-overt, the owner's property is not altered, and he may take them wherever he finds them, provided he uses due diligence in prosecuting the thief to conviction. So likewise, if the buyer knows the property not to be in the seller, or there be any other fraud in the transaction. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale. But it is said that there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses, unless bought in a fair or market-overt, according to the directions of the statutes 2 *P. & M. ch.* 7, and 31 *Eliz. ch.* 12. Nor shall such sale take away the property of the owner, if within a particular time after the horse is stolen he puts in his claim, and proves his property, and tenders to the purchaser such price as he *bona fide* paid for him in market-overt. That if any of the points stated in the above statutes be not observed, such sale is utterly void, and the owner shall not lose his property. These are the regulations now in use in *England;* but they do not operate here. In *Horwood vs. Smith*, 2 *T. R.* 750, it was held, that the owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in *trover* from the person who *purchased them in market-overt*, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. In 2 *Woodeson's Lectures*, 412, it is said, that by a sale the property is sometimes transferred.—For in a sale in open market it is good. The owner may get his property by prosecuting the thief to conviction. If goods stolen are gratuitously given away it is different. They must be sold. *Hardw. K. B.* 349. It is said in 2 *Azuni's Maritime Law*, 366, (note of the translator.) that the general rule in *England* has always been, that goods taken by pirates, as well as goods stolen on land, remained the property of the original owner, in whom they again vest on the conviction of the offender, unless they have been sold in *market-overt*. This exception of sales of stolen goods in *market-overt*, is peculiar to *England*, and was made for the convenience and security of public trade and commerce. Again, *(Ibid* 238,) that the laws of war give the victor the

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full right of property in the goods taken from an enemy; and if he sells them, the former owner cannot reclaim them, though he finds them in a neutral country, or even in his own; but in a note by the translator, it is said, that the *English* courts consider a *sentence of condemnation* by a court, constituted according to the law of nations, as requisite to change the property so as to bar the claim of the original owner.

Key and *T. Buchanan* for the Appellee. A market-overt must be by charter or prescription, and without it there can be nothing like a market-overt. There can be none in *Baltimore* for the sale of live stock, horses, &c. Even if there is, it has never been considered in this state that a sale divested the property out of the true owner, except in a certain way. It cannot be considered that a newly created market is to be considered as a market-overt. By the declaration of rights the inhabitants of *Maryland* are entitled to the common law of *England*, and of such statutes as had been introduced and practised under as applicable to their local situation. If the law as stated by the appellant's counsel is admitted, then the statutes of 2 *P. & M. ch.* 7, and 31 *Eliz. ch.* 12, which passed before our colonization, restricting the sale of horses, should extend to this country. By these statutes, the common law was altered before the colonization of the country; and the common law, which we are entitled to, is that common law which was in existence at the time of colonization. These statutes clearly changed the common law, and if so, the sale of horses by those statutes was exempted, except in a certain way. The party claiming must make his claim good in pursuance of those statutes. If the common law was altered, then the sale in this case was not a valid one; and if the statutes of *P. & M.* and *Eliz.* are applicable to our situation, then the purchaser of the horse must show that he purchased in a particular manner, taking it for granted, (which is denied) that there was a market-overt in *Baltimore*. He who buys in market-overt must know that he does so agreeably to the rules of the market-overt. There is no authority in the charter of the city of *Baltimore*, granted by the act of 1796, *ch.* 68, to pass any ordinance to affect persons, not citizens of *Baltimore*. Nor does the charter

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give any authority to establish a market for the sale of horses: but admitting such authority is given, yet being a special authority, it was not competent for the corporation, by any ordinance, to affect any person not a citizen of that city. Having a limited jurisdiction, there was no authority delegated to establish a market-overt, so as to affect persons not within their jurisdiction. The creation of a market-overt does not of course give a right to sell horses—It may give permission to sell provisions. The market space in *Baltimore*, means a portion of ground just by the market established for the sale of live stock, &c. A market-overt never attached to the erection of a new market, but only to an old established market, where the powers are given to hold a market-overt. It is not to be supposed that every market, established in the different counties for the sale of provisions, does imply that horses may be sold there. It appears that in *London* there cannot be sold, in a jeweller's shop, any thing not usually sold there. So in the market in *Baltimore* for the sale of provisions, it is not contemplated, nor is it to be inferred, that horses can be sold there. Upon the same principles, the sale of slaves might be made at such a market. It must be a market established for the sale of the particular species of property. The only act of assembly then is the act of 1793, *ch.* 59, for the sale of stock, horses, &c. at a different place from that at which the horse in question was made. This act was only in existence for seven years, and would not have been so long continued, if it had been believed that stolen horses might be sold, and the right passed by such sale. It may be conceded, that by the civil law the holder of property may sell, but it is denied that this is the law either in *Great Britain* or in this state. It would be holding out inducements to persons to steal property, and carry it to *Baltimore* for sale. Our laws contain a better policy, they protect the citizens against rogues. It has been decided in *Wheelwright vs. Depeyster*, 1 *Johns Rep.* 471, that the *English* law, in regard to sales in *market-overt*, is not applicable in the state of *New York*, where no such institution exists. Nor is it applicable in this state; and if it is, the sale in this case would not be legal.

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Martin, in reply. The opinion delivered by *Kent*, Ch. J. in *Wheelwright vs. Depeyster*, was *extra judicial;* for the judge acknowledged that the effect of a purchase in market-overt was not strictly before the court. The question before this court is, what is the common law of *England* as to markets-overt; and if there be any common law on the subject, has it been adopted in this state? *Caveat Emptor* is not the rule as to the personal property, but it is as to real property. Possession of personal property is *prima facie* evidence of right. This is essentially necessary for the benefit of commerce. Every market is a market-overt, and means an *open market*, in which every thing usually sold is a good sale. A sale openly made in market, is made in market overt. It is of no consequence how the market is established; if it is an established market, that is sufficient for the sale of an article usually sold in such market. In shops it is not usual to sell horses, but in other markets they may be sold. In country markets any thing may be sold to supply the wants of the people. Several acts of assembly passed establishing markets in the city of *Baltimore*. Sales were not confined in those markets to provisions, but every kind of provisions, live stock, goods, and every description of thing was permitted to be there sold. The act of 1793, *ch.* 59, established a market for the sale of live stock, &c. and it pointed out a different place where the market should be, because inconveniencies arose from the sale of live stock, &c. in the other markets, where they had been sold before. This act, not answering the purposes for which it was intended, was permitted to expire, and the sale of live stock, &c. left as it was before that act. It is right and proper that a fair purchaser, who *bona fide* pays his money, should be protected in his purchase. The original owner is sufficiently protected if he prosecutes and convicts the thief. The statutes of *P.* and *M.* and *Eliz.* protect as to horses; but the price *bona fide* paid, must be repaid to the purchaser.

JUDGMENT AFFIRMED.

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Smith vs Smith

SMITH, *et al.* vs. SMITH, *et al.*

T T. by his will dated in 1795, devised his lands to be equally divided between his two nephews, W C and W S, to them and their heirs forever: and in case W C died without lawful issue, then he devised one half of the lands to his nephew G S, to him and his heirs forever. *Held*, as to a moiety of the lands devised to W C, that on his death without lawful issue, the estate tail became extinct—and the limitation over to G S took effect, and one moiety of the lands vested in him in fee simple.

The act of 1786, ch 45, to direct descents, as to estates tail general, and for transmitting the tenancy in tail to the issue of the tenant, is altered or changed only, by making the land descendible to all the children of the tenant in tail and their respective issue indefinitely.

APPEAL from the Court of Chancery. The bill filed by the appellants stated that *William Crandell*, being seized in fee of a tract or tracts of land situate in *Anne-Arundel* county, did, by his will dated in 1795, devise the same in fee tail general to *William Crandell*, of *Adam*, and to *William Smith;* and in case the said *William Crandell* should die without lawful issue, then he devised one half of the land to his nephew *Gilbert Smith*. The devise is as follows: "I devise and bequeath unto my dear wife *Emelia*, during her widowhood, all my tract of land known by the name of *Grammer's Parrot*, and at the day of her death or marriage, I leave the above mentioned tract of land to be equally divided between my two nephews, *William Crandell*, son of *Adam*, and *William Smith*, to them and their heirs for ever; and in case the above named *William Crandell* dies without lawful issue, then I give one half of the above mentioned tract of land to my nephew *Gilbert Smith*, to him and his heirs for ever." The testator died shortly after the date of the will, without changing or revoking it; and a few years thereafter, both the devisees died minors, and without issue. The testator had no issue, but had one brother and sister of the whole blood, and one brother of the half blood. The brother of the whole blood was named *Adam Crandell*, who died before the testator, leaving two children *William*, the devisee, and *Sarah*, the last of whom died a minor, and without issue. *Sarah*, the sister of the testator of the whole blood, married one *Nathan Smith*, by whom she had five children, viz. the complainants, *Elizabeth* and *Sarah*, and *Gilbert Smith*, the person named in the will, and *Hannah* and *Sophia Smith*, (minors,) the defendants. The complainants stated in their bill, that they were advised, that on the above facts, the disposition over to *Gilbert Smith* was void, and that all the property devised to the two devisees, had descended to or devolved on them by virtue of the act of descents; but that on account of the minority of two of the heirs, a sale or division could only be effected in this court. They also stated, that *William Crandell*, the devisee, was seized in fee of other land, which, on the above facts, descended as before stated; and that the land could only be sold or divided by this court. *Prayer* for a sale of the lands, or

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a partition thereof, as on a consideration of all circumstances should seem most advisable, &c. Upon the coming in of the answers of the defendants, which admitted the facts as to the descent, the defendant, *Gilbert*, submitted the legal construction and operation of the will to the chancellor, and he, in pursuance of the act of 1806, *ch.* 55, requested the opinion of the honourable *Jeremiah Townley Chase*, Chief Judge of the third judicial district, on the question, "Whether the disposition over to *Gilbert Smith* was *void*, so as to leave the land to descend to the five heirs of *Sarah Smith*, as alleged in the bill; or whether, by the death of *William Crandell*, of *Adam*, without lawful issue, the devise of half the land to *Gilbert Smith* was effectual to give him a title thereto, or, (according to the question raised by the counsel for the complainants,) whether the devise took effect immediately on the death of *William Crandell*, or whether the land descended to the whole of the heirs of *William Crandell*?"

Upon this submission and request, the question was argued before Judge *Chase*.

Johnson, (Attorney General,) for the complainants. The only question in this case is, whether an estate tail general, created since the year 1788, when the act to direct descents, (1786, *ch.* 45,) took effect—remainder in tail, will, on the death of the first tenant in tail, descend to his collateral heirs, or whether, on the death of the tenant without issue, and without docking the entail, the right of the remainder-man will take effect in possession? The case is this—land is devised to *William Crandell*, and in case he dies *without issue*, then to *Gilbert Smith*. *Crandell* died without issue, but leaving other heirs besides *Gilbert Smith*, capable of inheriting under the act to direct descents, if he had had the fee simple. But he only held an estate tail—Are then those heirs, who could have inherited if he had died seized in fee, entitled to any part of the *estate tail*, or will the property go over to the remainder-man, *Gilbert Smith*? Previous to the act to direct descents, it is clear none but the issue of the tenant in tail could inherit; if there were no issue, the remainder would take effect. It is plain and evident the will gave an estate tail general to *William Crandell*; for in all cases where the issue generally, that is male or female, can in-

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herit the estate tail, there it is an estate tail general, whether there is a limitation over or not. To prove this authorities are not necessary. If then *William Crandell* had an estate tail general, on his death who were entitled? By the act to direct descents, it is expressly enacted, if any person seized in fee or of *a fee tail general*, shall die intestate, the land shall descend as in the act prescribed. The subsequent clauses in the act declare, that what is previously enacted with respect to the land in tail, shall not extend to any estate tail, *made, created and in being*, before the passage of the act. The reverse of the proposition is equally true, that the provisions respecting the estates tail *made, created and in being*, after the passage of the act, shall be affected by its provisions. But *William Crandell* obtained an estate in tail general after the act, and therefore that estate is affected by the act; and if this be true, which appears self-evident, then it follows, on his death intestate, the right he had in the land descended to those persons made capable of inheriting by the act, and in the proportions there provided for. Previous to this act none but the issue could inherit an estate tail. As then the issue alone inherited by the provisions of pre-existing laws, and as the legislature in 1786, when the act to direct descents passed, were equally competent to make other persons besides the issue capable of inheriting, and as by that law they have done so to affect cases commencing after its operation, it surely follows, that those made capable of so inheriting are entitled to the respective portions of the land. If additional reasoning was deemed necessary to support the above principles, and if any other part of the act need be resorted to in proof of the construction contended for, the *sixth section* will make it clear. That section declares, that that law shall not extend to affect any grant or devise of land to "*special or particular heirs*;" that is, to affect any *estate tail special*. But the exception of the *estate tail special* proves the *estate tail general* to be included; for the exception proves the general rule. It may be supposed that estates tail general are embraced by it, so far as to let in *all the issue* of the tenant in tail, but not to affect collaterals. This interpretation is inadmissible. For surely, if the law was competent to bring in with the eldest the youngest son of the tenant in tail, it was equally competent

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to introduce the collateral heirs, as persons capable of inheriting the estate. The question then is, has not the act done so? It provides that "if any person seized of an estate in any lands, &c. in fee simple, or fee simple conditional, heretofore or hereafter acquired, or of an estate in fee tail to the heirs of the body generally, created and acquired after the commencement of the act, shall die intestate, such lands, &c. shall descend to the *kindred*, male and female, in the following order, to wit: First to the child or children, and their descendants, if any, equally, and if no child or descendant, then to the father, and if no father living, then to the brothers and sisters of the intestate," &c. It is certain that this act was not prepared with due reflection; for we find in the clause above in part recited, a distinction made between estates in fee simple conditional, and estates in tail general, the former, although created before the act, are operated on by it, the latter not; and yet it is clear, at the time the law passed, there could be no such thing as an estate in fee simple conditional. All such estates were by the statute of *Westminster* converted into estates tail either general or special. Again, in the same clause we find a provision made that lands, which have descended from the father to the son, shall, on the death of the son without issue, go to the father; but it is certain land could not descend to the son until the father died, and if so, none but the maker of the law can tell how they could ever go back again to him. *Co. Litt.* 19. But let the act be ever so inaccurately drawn, yet when the language is plain, its provisions, however absurd, must be carried into effect. Nothing then is more plain than its language, which says, if the tenant in tail general shall die intestate, without leaving issue, or father, the land shall go *to the brothers and sisters*, and their descendants. The course of descent pointed out by the act extends to all the previous estates mentioned—fee simple, fee simple conditional, and fee tail general. From what part of the act can it be inferred, when in this part it is said they shall descend in one general uniform manner without respect to the previous estate, that the rules of descent prescribed are confined in their full extent to one species of estate, the fee simple? It does not declare where an estate tail general is created after the act, if the tenant in tail shall fail to leave *issue*, that then the estate shall go to a

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remainder-man or reversioner. On the contrary it says, the previous estate shall not cease while persons exist made capable of inheriting. Is it not certain the whole comprehends all its parts? And as there are three kinds of estates, fee simple, fee simple conditional, and fee tail general, they are the respective parts of that whole on which the law operates, and operates by declaring in certain events the brothers and sisters may inherit. In the case under consideration, these events did take place. Before the passage of this law, the tenant in tail could totally defeat the remainder over. A deed executed by him would have that effect. The deed obtains that effect by a previous law. The act to direct descents only places his interest in the power of more persons, by making more persons capable of inheriting. If the legislature had the right to do the one, they could do the other. They have most clearly done the first, and it is equally evident they have done the last.

Ridgely, for the Defendants.

Chase, Ch. J. certified the following opinion to the Chancellor: On the question of law, submitted to my decision by the honourable the chancellor, arising in this case under the will of *William Crandell*, and the act to direct descents, (1786, *ch.* 45,) it appears to me that the true construction of that act, as to estates tail general, created and acquired after the commencement of it, is, that the course or manner of transmitting the tenancy in tail to the issue of the tenant, is altered or changed only by making the land descendible to all the children of the tenant in tail, and their respective issue, indefinitely, and not the eldest son, in the first instance, in exclusion of the other children. It could not be the intention of the legislature to abolish estates tail general, or remainders limited thereon, and to convert them into fee simple estates by giving them the same properties.

The words of the act must receive such an exposition as they are capable of, and must be so construed as to carry into effect the evident intention of the legislature. That part of the act which relates to the collateral relations of the intestate, cannot apply to a tenancy in tail, because such estate cannot descend to collaterals. As soon as the

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tenant in tail dies without issue, his estate and interest in the land ceases, and in the same instant the limitation over, on the extinction of the estate tail, vests in the remainder-man, and no estate remains in the tenant in tail, which is transmissible to his collateral relations.

According to my judgment, it was not in the contemplation of the general assembly to alter or change the nature of an estate tail in any other respect than by making it descendible to all the children, and this is plain from the *sixth section* of the act. It certainly could not be contemplated by the legislature to give the estate tail an existence after the failure of the issue of the tenant in tail, contrary to the nature of the estate, and the words of the grant, and in violation of the rights of the remainder-man.

The words of the law must be expounded according to the subject matter, and that part which relates to collateral relations must *ex necessitate rei*, be confined to estates in fee simple, and cannot comprehend estates which have no existence at the time of the decease of the intestate.

I am of opinion, in this case, as to a moiety of the land devised by *William Crandell*, that on the death of *William Crandell*, of *Adam*, one of the devisees, without lawful issue, the estate tail became extinct, and the limitation over to *Gilbert Smith* took effect, and one moiety of the land vested in him in fee simple.

Kilty, Chancellor, thereupon passed the following decree: The object of the bill in this cause is to obtain a decree for the sale or partition of certain lands therein mentioned, which are alleged to have descended to, or devolved on, the complainants and defendants, as the children of *Sarah Smith*, who was the surviving sister of *William Crandell*, but which lands could not be sold or divided on account of the minority of two of the said heirs. (The chancellor here stated the facts of the case and then proceeded.)

After hearing the arguments of the counsel on the trial, the chancellor considered it the most proper course to request the opinion of the chief judge of the third judicial district, as he is empowered by law to do. And on this request, and the answer thereto, which are among the proceedings, the opinion of the chief judge was declared as follows: "As to a moiety of the land devised by *William*

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Crandell, that on the death of *William Crandell*, son of *Adam*, one of the devisees, without lawful issue, the estate tail became extinct, and the limitation over to *Gilbert Smith* took effect, and one moiety of the land vested in him in fee simple."

In conformity to the opinion thus expressed—*Decreed* by the chancellor, that the complainants are not entitled to a sale or partition of that part of the land of *William Crandell* which by the will was devised to *Gilbert Smith*, in case *William Crandell* therein mentioned should die without lawful issue, and that a decree for such sale or partition ought not to be made.

The decree goes on to direct a sale of the other land.

The complainants appealed to this court. But the case having been compromised, it was at the present term,

DISMISSED.

JUNE

AMOSS vs. ROBINSON *et al.*

A R, being indebted, as deputy sheriff and deputy collector, to R A, suits were brought on his bonds as such, and judgments obtained thereon. A few days before the judgments were obtained, A R, conveyed the whole of his real and personal estate to A J and R B, who were sureties for him in the bonds before mentioned. R A filed a bill against A R, A J and R B, charging that the conveyance was fraudulently executed, with intent to deceive and injure him, and though apparently for the consideration of £200, was in truth executed without consideration of money, but intended to guarantee and indemnify A J and R B as sureties in the bonds; that A R retains possession of the property, and has sold a part thereof to his own benefit. Prayer for a disclosure of the trusts, and vacation of the deed, and for general relief. A J, in his answer, stated that A R was indebted to him for money paid as his surety to other persons, and also indebted to him on open account, and for money lent. *Held* that the real and personal property, and the increase, if any, remaining in the hands of A R, A J and R B, or any of them, be sold for the purpose of paying, in the first place, the sum of money due to R A.

APPEAL from a decree of the Court of Chancery. The bill in this case was filed by the present appellant against *Archibald Robinson*, *Abraham Jarrett*, and the administrators of *Ralph Bond*. It stated that the complainant had been sheriff and collector of *Harford* county, and that he appointed *Robinson* one of his deputies, who gave two bonds, one as deputy sheriff and the other as deputy collector, conditioned for the faithful performance of his duties; that in the bond as deputy sheriff, *Jarrett* was his surety, and in that as deputy collector *Ralph Bond* was his surety. That *Robinson* having greatly defaulted in his duty, and being largely in arrear to the complainant, suits were brought on both the bonds, and judgments obtained against him on each bond at March term 1790, for a large sum of money. That *Robinson*, being seized and possessed of considerable real and personal estate, and for the purpose of fraudulently deceiving and injuring the complainant, a few days before the obtention of the judgments against him, conveyed his real estate to *Jarrett* and

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Bond, in fee simple, apparently and for the pretended consideration of £200, when in truth the conveyance was executed without consideration of money, and intended to guarantee and indemnify *Jarrett* and *Bond* as sureties in the said bonds, who have never been damnified, or paid the complainant any thing on account of *Robinson*, but hold and enjoy the real estate, and also the personal property of *Robinson*, also conveyed to them since the judgments, as a further indemnity. That they have permitted *Robinson* to sell part of the personal estate for his own use and benefit, &c." *Prayer* for a disclosure of the trusts, and vacation of the deeds, &c. and for general relief.

The *answers* of the defendants admit that the deeds were executed for the purpose of indemnifying and securing *Jarrett* and *Bond*, as securities for *Robinson*. That *Jarrett* had become *Robinson's* surety to other persons, and he had a claim against him also on an open account, and for money lent, and the conveyances were not only to secure him as surety to the complainant, but also to secure the payment of the money due, or for which he was so answerable, to other persons. That the defendants were ready and willing that the property should be sold, and the proceeds applied to the discharge of the claims due *Jarrett* and *Bond*, and the residue to discharge *Robinson's* debts. The answers also stated, that *Robinson* was prevailed upon to confess judgments upon the terms of all payments and discounts made appear, to be allowed, and which the complainant now refused to allow, and that they can prove, that but a small sum of money, if any, is due on the judgments, upon a fair and just settlement.

Testimony was taken under a commission as to the amount due to the complainant, and the account was audited by the auditor, stating the sum of £295 6 8, current money, exclusive of interest, to be due to the complainant, and £148 18 10 current money, exclusive of interest, due to *Jarrett* from *Robinson*.

Hanson, Chancellor, (December term 1804.) When a man becomes security for another, and is answerable for his debt, the chancellor cannot conceive there is any fraud in the principal's conveying property to secure him, and likewise to secure the payment of any advances that may be afterwards made by the security. In short, the chan-

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cellor does not perceive that the creditor, having taken a surety for his debt, has a right to vacate any conveyance made to the surety by the principal for the purpose of counter security. The situation of the surety would be hard if the rule were otherwise. The circumstance of the sureties afterwards becoming insolvent, supposing that to be fairly a part of the case, which it is not, the chancellor conceives has no effect on the case. But inasmuch as the surety, to whom the conveyance is made, is answerable to the principal, and is to be considered as trustee to the principal for any surplus remaining after the surety is secured, and the law gives a recourse to the equitable interest of a man against whom a judgment has been obtained, the chancellor is of opinion, and it is adjudged, ordered and decreed, that the land conveyed to the defendant, *Abraham Jarrett*, as stated in the bill, be sold for the purpose of paying, in the first place, the debt due from *Robinson* to *Jarrett*, and then to discharge the debt due to the complainant; the said debts being established, or to be established, by this court. That *John Moores*, esquire, be and he is hereby appointed trustee for making sale, &c. From this decree the complainant appealed to this court.

The cause was argued before Polk, Buchanan, and Nicholson, J. by

Ridgely, *Key* and *T. Buchanan*, for the Appellant; and by

Johnson, (Attorney General) for the Appellees.

The Court *reversed* the decree of the court of chancery, with costs; and decreed that the land and personal property conveyed to *Jarrett* and *Bond*, by *Robinson*, in the bill of complaint, together with the increase, if any, of the personal property which remained in the hands of the appellees, or any of them, be sold under the direction of the court of chancery, for the purpose of paying, in the first place, the debt due from *Robinson* to the appellant, amounting to the sum of £512 12 11, current money, adjudged and decreed by this court to be due to the appellant, with interest from the 7th of July 1808, until paid, and also the complainant's costs in the court of chancery. Also decreed, that the chancellor appoint a trustee for the purpose of making sale of the said real and personal property, and that the course and manner of

his proceedings shall be pursuant to the directions of the chancellor in that respect; and also that the chancellor pass such order and decree in the premises as may be necessary for carrying this decree into full effect.

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Cato vs Howard

DECREE REVERSED.

Negro Cato vs. Howard.

June.

A slave sold by parol for a term of seven years with an agreement between the vendor and vendee that at the end of the seven years he was to be manumitted, by the vendee. At the end of that time the vendee executed a deed of manumission. *Held*, that the slave was free.

Appeal from *Montgomery* county court. This was a petition for freedom, preferred by the appellant. At the trial he offered evidence to the jury to prove, that in January 1793, *Nathan Harris* was the owner of the petitioner; that by parol he sold him to *Jesse Harris* in that year, for seven years, for £65, and that at the end of that time the petitioner was to be free. *Jesse* and *Nathan Harris*, at the time of the sale of the petitioner, did agree by parol, and it was part of the bargain, that *Jesse* should at the end of seven years, from the time of the sale, or sooner if he pleased to do so, manumit and set the petitioner free. The petitioner was delivered by *Nathan* to *Jesse*, and served *Jesse* until about the month of January 1799. In February 1799, *Nathan*, without the consent of *Jesse*, sold the petitioner as a slave to *Howard*, who soon after took the petitioner into his custody as a slave, and still holds him as such. On the 2d of March 1799, *Jesse* executed a deed of manumission of the petitioner, which was duly acknowledged and recorded. *Nathan*, after his sale to *Jesse*, several times declared that he had no right to the petitioner, and that *Jesse* was the person who was to set him free. On these facts the petitioner prayed the opinion of the court, and their instruction to the jury, that if they were of opinion from the evidence, that *Jesse Harris* purchased the petitioner from *Nathan Harris* in the year 1793, for seven years, and that it was part of the terms of sale and purchase, that *Jesse* should, at the end of seven years or sooner, if he chose to do so, set free and manumit the petitioner, that the petitioner was entitled to his freedom for life by the aforesaid deed of manumission, if the petitioner was, at the time of the execution of that deed, of healthy constitution and sound in mind and body, and capable by labour to procure sufficient food and raiment, with other requisite necessaries of life, and was not more

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than forty-five years of age. But the court, *(Clagett*, Ch. J.) was of opinion, and so instructed the jury, that if they should find that the sale and purchase between *Nathan* and *Jesse Harris*, was as above stated, that the petitioner is not entitled to freedom under the deed of manumission. The petitioner excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before TILGHMAN, POLK, and BUCHANAN, J. by

Martin, for the Appellant, and by
Mason, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JUNE

Where the attorney of the plaintiff had given the defendant a receipt for a sum of money, stated to be in full of the judgment, but which was for a less sum than the amount due—*Held*, that the receipt was not conclusive evidence that the judgment was satisfied so far as to prevent the plaintiff from taking out execution on the judgment for any balance which might be actually due thereon.

HUGHES vs. O'DONNELL.

APPEAL from *Baltimore* county court. This was an action on the case, for maliciously causing the plaintiff, (now appellee,) to be taken in execution, and falsely imprisoned, on a judgment which had been satisfied, &c. The general issue was pleaded.

1. The plaintiff, at the trial, offered in evidence a record of a judgment, and proceedings thereon, in a suit wherein the defendant (now appellant,) was plaintiff, and the plaintiff, (the appellee,) was defendant, setting forth, that at May term 1800, a judgment was recovered in the general court, by the then plaintiff, for £110 4 0 current money damages, and $61 50 and 1863 lbs. of tobacco, costs. That on the 3d of February 1801, a *ca. sa.* issued on the judgment, and was served on the then defendant. The plaintiff also offered in evidence the following receipt of *Zebulon Hollingsworth*, esquire, attorney for the plaintiff in the judgment, to prove its payment and satisfaction: "4th August 1800. I have this day received of *John O'Donnell*, esquire, the sum of one hundred and forty pounds one shilling and ten pence, in full of the within judgment.

Z. Hollingsworth, Att'y. for *C. Hughes.*"

The defendant then offered to show, that the above receipt was given by mistake for a less sum of money than was due on the judgment. But the court were of opinion,

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that the receipt was conclusive evidence that the judgment was satisfied, so far as to prevent the plaintiff therein from issuing any execution for any balance that might in fact be due. The defendant excepted.

2. The plaintiff further offered in evidence, that the defendant in this cause, notwithstanding the receipt, and the notice thereof, ordered an execution to issue for the whole amount of the judgment, without endorsing thereon the sum of money so received on account thereof, and directed the whole amount to be executed for. The defendant then moved the court to direct the jury, that notwithstanding the receipt, if there was any balance due on the judgment, that the plaintiff in the judgment might take out an execution for the same. But the court was of opinion that the receipt, purporting to be in full of the judgment, *Hughes* was so far bound thereby that he could not take out execution for any balance which might be actually due. The defendant excepted. The verdict and judgment being for the plaintiff, this appeal was brought by the defendant.

The case was argued before TILGHMAN, BUCHANAN, and GANTT, J. by

Harper, for the Appellant. The receipt in this case, though expressed to be in full of the judgment, was not so, and not being so, was not conclusive satisfaction of the judgment, and an execution might issue for the balance, and the plaintiff in the judgment was not bound to endorse the sum of money which had been paid. The authority of an attorney at law ceases after the judgment is entered, and he has no right to enter the judgment satisfied, when in fact it is not so. He may perhaps receive payment, and give a receipt therefor; but he has no right to enter the judgment satisfied. He may say what he has received, and as far as that payment goes, it probably is a discharge. Until the whole sum of money, however, is received, the plaintiff may go on and issue execution, and if a part only is due, he can issue for that. The opinion of the county court goes so far as to say that the attorney may enter the judgment satisfied, and the plaintiff is bound by it. It has been decided that an execution is not rendered illegal if it has not an endorsement of the amount actually due. The sheriff is not bound to

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execute the writ without such endorsement; but he may do so if he pleases. *Howard* vs. *The Levy Court*, 1 *Harr. & Johns.* 566.

Purviance and *S. Chase*, jr. for the Appellee. If the principal himself had received the money, and given a receipt in full of the judgment, he could not issue an execution thereon, unless he had given notice of the mistake. If the attorney enters a judgment satisfied, the plaintiff is bound by it. He has his remedy against the attorney, but cannot go against the defendant. The authority and extent of the powers of an attorney are fully laid down and recognized in the following authorities: *Latuch vs. Pasherante*, 1 *Salk.* 86. *Lamb vs. Williams*, *Ibid* 89. *Powel vs. Little*, 1 *W. Blk.* 8. *Welsh vs. Hole*, 1 *Doug.* 238. 1 *Roll. Ab.* 291, *pl.* 17, 20. 1 *Bac. Ab.* 188. 1 *Com. Dig.* 40. *Read vs Dupper*, 6 *T. R.* 361. *Randle vs. Fuller*, *Ibid* 456. *Ormerod vs. Tate*, 1 *East*, 464. There was no endorsement on the execution of any money paid, and the defendant was taken in execution for the whole amount of the judgment. The jury were to judge whether it was a malicious proceeding, and if so, to give damages accordingly. It does not appear that the execution issued for the balance. If any balance was due, it was only £1 19 9, which might have been settled in another way. There might have been a preceding payment. The appellant, with a full knowledge of the payment which had been made, issued the execution for the whole amount for which the judgment had been rendered. This action is for a malicious prosecution of an execution; for vexatiously causing the appellee to be taken in execution, and demanding a larger sum of money than was due; for an abuse of the process of the court. It would be a dangerous doctrine if a client could undo and destroy what his attorney had done. If an attorney recovers a judgment for a sum of money which his client might consider too small, could he dissent from the judgment, and bring a new suit? The same principles prevail with respect to the attorney as to all other kinds of agents. If an attorney abuses the interest of his client, he is answerable to him. The receipt of the attorney was sufficient to authorise the clerk of the court to enter the judgment satisfied; and it not being so entered, can make no difference. Ad-

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mitting that the receipt did not operate as an extinction of the claim, yet it operated so far as to prevent an execution from issuing. The appellant did not issue the execution upon the ground of a small balance being due, but he issued it for the whole. He should have given notice to the appellee of the mistake, and that a balance was due. His proceeding was as much an abuse of the process of the court, in demanding a large sum of money, when little was due, as it would be to demand a larger sum when there was nothing due.

Harper, in reply. During the pendency of a suit the attorney's acts will bind his client. He is then pursuing his authority. But his authority ceases when judgment is obtained, and he has no right to enter it satisfied when it is not so. If he acts within his instructions, it will bind his client.

THE COURT dissented from the opinions expressed by the court below, in both of the bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

RATRIE VS. SANDERS.

JUNE

Where the defendant was in possession of, and holding a slave, for the space of three years antecedent to the institution of an action of replevin against him for the slave—*Held*, that the statute of limitations was a bar to the plaintiff's recovery, notwithstanding the property in the slave had been in the plaintiff, and the slave was by him loaned for an indefinite time to J S. who during that loan sold the slave to the defendant; and although the suit was bro't within three years from the time the plaintiff knew of such sale.

APPEAL from *Montgomery* county court. The appellant brought an action of *replevin* against the appellee, for a negro slave called *Jane*, to which *non cepit infra tres annos*, and *actio non accrevit infra tres annos*, and property in the defendant, were pleaded. The defendant, at the trial, prayed the court to direct the jury, that if they were of opinion from the evidence, that the defendant had been in the possession of *Jane* for the space of three years prior to the institution of this suit, holding her as his own property, that then the act of limitations was a bar to the plaintiff's action. But the court, (*Clagett*, Ch. J.) refused to give the direction; but did direct the jury, that if they were satisfied that the property in said slave was in the plaintiff, and that he lent her for an indefinite time to *Joseph Sanders*, and during that loan *Joseph Sanders* sold her to the defendant, that by the sale the defendant stood in the same situation that *Joseph Sanders* had stood in, and that the act of limitations did not begin to run against the plaintiff un-

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til he knew of the sale by *Joseph Sanders* to the defendant. The defendant excepted; and the verdict and judgment being against him, he brought the present appeal.

The case was argued before TILGHMAN, POLE, and BUCHANAN, J.

Key, for the Appellant, referred to the act of 1715, ch. 23, s. 2.

Mason, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DEC. (E. S.)

GRAY and BIDDLE vs. WOOD, *et ux.*

An action on a promisso y note, *endorsed in blank*, by the payee, may be maintained in his name for the use of the holder, although the holder paid a valuable consideration to the payee at the time of the endorsement.

A promissory note is not invalidated by being antedated

APPEAL from *Cecil* county court. An action of *assumpsit* was brought in the names of the appellees, for the use of *Benjamin Shuyter*, upon a promissory note dated the 1st of January 1801, executed by the appellants, and payable on demand to *Elizabeth*, (the female appellee.) whilst she was sole, by the name of *Elizabeth Hugg*, or order. The general issue was pleaded.

1. At the trial, the original note was produced by the plaintiffs in support of their action, and there appearing a blank endorsement in the name of the payee, *Elizabeth Hugg*, which the defendants proved to be her hand writing, the defendants insisted that the note was transferred by the endorsement to *Benjamin Shuyter*, of which the institution of the suit for his use was an evidence. The defendants also offered testimony to show, that at the time this endorsement was made, *Shuyter* paid a valuable consideration for the note to *Elizabeth Hugg*, with a view to contend that the whole interest of the payee, in the note passed to *Shuyter*, and that the action ought to have been in his name as endorsee. But the court, [*Tilghman*, Ch. J. and *Purnell*, A. J.) refused to let the testimony go to the jury, and were of opinion that the same was inadmissible. The defendant excepted.

2. The plaintiffs then called the subscribing witness to the note, to prove the execution of it, who proved that the note was executed by the defendants, and attested by him the witness, but not on the 1st of January 1801; that the note was antedated, and he did not know on what day it was executed. The defendants then prayed the court to

direct the jury, that this was not sufficient and proper evidence to go to the jury, to support the issue joined on the part of the plaintiffs. But the court were of opinion, that the evidence was competent and proper, and permitted it to be given. The defendants excepted; and the verdict and judgment being for the plaintiffs, this appeal was prosecuted by the defendants.

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The cause was argued in this court before BUCHANAN, NICHOLSON, and GANTT, J. by

Cosden, for the Appellants; and by
Earle, *Barroll* and *Carmichael*, for the Appellees.

THE COURT concurred with the County Court in the opinions expressed in both of the bills of exceptions.

JUDGMENT AFFIRMED.

DAVIS *et ux.* vs. WALSH.

DECEMBER.

W D becoming an insolvent debtor, his real estate was sold by his trustee, and purchased by C D, to whom a deed was executed. C D, in making the purchase, acted professedly as a friend to W D, so far that if he could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he could not raise the purchase money, it became necessary to sell a part of the estate to reimburse C D, which part W D and M his wife, were desirous to preserve to themselves, and were anxious to procure a friend to become the purchaser for and on behalf of M, the wife, and as a trustee for her; which intention, previous to the sale, was made known to R W, who approved of it, and it was agreed that J S. should be the nominal purchaser, and R W was to be his surety for the purchase money. J S became the purchaser, and it was known and understood, at the time, that he purchased for M the wife of W D. R W became surety for J S, and W D has always been in possession of the premises. W D, having part of the purchase money applied to R W, to obtain a bond of conveyance from C D to M, the wife of W D, for the property, when he was informed by R W that he had got a bond to himself, as J S had given it all up to him, and that W D had nothing to do with it. J S had been induced, in order to secure R W, to direct C D to give a bond of conveyance to R W, who assured J S that no advantage should be taken of W D, and that when he paid the purchase money, a deed should be executed to his wife M. The premises were conveyed by C D to R W, who brought an action of ejectment against W D. The amount of principal and interest, of the purchase money, was tendered by W D to R W, and a deed demanded, which he refused to execute. W D, and M his wife, filed their bill against R W, to be quieted in their possession of the premises, and to compel a conveyance from him to M, the wife—*Decreed*, that R W convey the land in question to W D, and M, his wife, in fee simple, and that an account be stated, &c, and the balance due be paid at the time R W shall convey the land.

Appeal from a decree of the Court of Chancery, *dismissing* the bill of complaint. The bill stated, that *Davis* being seized of a valuable real property, and also possessed of a considerable personal estate, consisting, among other things, of certain chattels real, and being also indebted to divers citizens of this and of the *United States*, beyond what he was able to pay without a greater indulgence than his creditors were disposed to grant him, was compelled, sometime in the summer of the year 1787, to apply to the chancellor for the benefit of the act of assembly respecting insolvent debtors; that in consequence

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thereof *Stephen Wilson* and *Robert Lemmon* were appointed trustees on behalf of the creditors of *Davis*, and that he executed to them, on the 10th of October 1788, a deed of all his real and personal property. That the trustees proceeded to sell, and did sell a part of the property to *Cumberland Dugan*, for the sum of £1310 current money, and on the 6th of November 1792, the trustees executed to *Dugan* a deed for the property so to him sold. That *Dugan*, in making the purchase, acted professedly as the friend of *Davis*, so far, that if he *Davis* could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he was not able so to do, it became necessary to sell the property, or a part thereof, to raise the purchase money, and to indemnify *Dugan*; and that *Dugan* being about to sell the property, and among the rest the following five lots, distinguished on a plot of *Baltimore* town by the numbers 950, 951, 952, 953 and 954, which lay connected and adjoining each other, on which *Davis* had a house, in which he resided with his family, and also a garden adjoining the house, which *Davis* and his wife were particularly desirous to preserve for themselves, but thinking themselves not able to purchase the whole of the lots, they were anxious that the lots should not be sold together, but subdivided into three or more subdivisions, each to be sold separately, and one of the subdivisions to include the house and garden; and in that case it was agreed that a friend should become the purchaser of the subdivision, including the house and garden, for and on behalf of *Mary*, the wife of *Davis*, and as a trustee for her, and that upon the purchase money being paid, the subdivision, so to be purchased, should be conveyed to her; and the better to effect this design, *Davis* and wife conversed with *Walsh*, the defendant, who professed himself a very warm friend to *Davis* and wife, and requested him to endeavour to prevail on *Dugan* to sell the lots in subdivisions, to enable *Mary*, the wife of *Davis*, by the intervention of a friend, to become the purchaser, fully disclosing to *Walsh* the intention of *Davis* and wife, that the wife should thus become the purchaser of that subdivision which should include the house and garden. *Walsh* perfectly approved *Davis* and wife's design, and promised to give his assistance for its completion, but declared, that in preference to applying to *Dugan* himself,

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he would apply to major *Thomas Yates*, the auctioneer, and solicit him to procure *Dugan* thus to subdivide the property, and as an encouragement for *Dugan* so to do, he would let *Yates* know that in such case he, *Walsh*, would purchase one of the subdivisions, consisting of meadows. That *Walsh* accordingly applied to *Yates* to procure a subdivision of the lots, informing *Yates* that it was intended the subdivision, in which the house and garden were included, should be bought in, in trust for the wife of *Davis*; and *Yates*, in consequence, prevailed on *Dugan* to subdivide the lots into three subdivisions, in such manner that one of them, containing nearly one acre of ground, should include the house and garden. That *Davis* and wife agreed with *Joseph Stockton*, who married the sister of the wife of *Davis*, to be the nominal purchaser of the house and garden for the wife of *Davis*, and to attend the sale and bid off the said subdivision for her, with which *Walsh* was fully acquainted. That *Davis*, the morning before the sale, applied to *Walsh* to be the security of *Stockton* for complying with the terms of payment, provided *Stockton* purchased the house and garden on behalf of the wife of *Davis*, which *Walsh* agreed to do. That both *Davis* and wife, as well as *Walsh* and *Stockton*, attended the sale; that *Stockton* bid for the subdivision, including the house and garden, and it was struck off to him for the sum of £135, that being the highest bid for the same; and that *Walsh* became the purchaser of the other two subdivisions, giving for the one £90, and for the other £83. That *Walsh*, *Dugan*, and others, well knew that *Stockton* bid for the wife of *Davis*; that this was repeatedly mentioned, and that publicly, during the auction, and while he was bidding for the property. That by the terms of the sale, one-third of the purchase money was to be paid in three months from the day of sale, one-third in six months, and the other third in nine months, and that the sale was made on the 15th of June 1792, before which time *Wilson* and *Lemmon* had made their sale to *Dugan*, although they did not execute the deed to *Dugan* until some months after. That *Stockton* executed and delivered to *Dugan* a bond, with *Walsh* his surety, for payment of the purchase money for the subdivision purchased by *Stockton* for the wife of *Davis*; the money to pay for which was to be furnished and provided by *Davis*; and that *Walsh* executed and delivered to *Dugan* a

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bond, with *Stockton* his surety, for the purchase money of the other two subdivisions. That *Davis* and wife *have had the constant actual possession of the subdivision* so bid off by *Stockton*, ever since the said purchase. That the day of the sale, *Davis* was at the house of *Stockton*, when *Dugan* was there with bonds to be executed for the purchase money, and *Davis* observed that they ought to state the money was for the house and garden, but *Dugan* replied, it was immaterial, for that he would at any time give a bond for the conveyance thereof. That sometime after the sale, *Davis* called on *Walsh*, and told him he thought it time for *Dugan* to give his bond to convey the house and garden; for that he, *Davis*, had procured a great part of the sum first to be paid, and that he *Davis* wished to have a bond for the conveyance before he made the payment; whereupon, after a short pause, *Walsh* replied, to the amazement of *Davis*, that he, *Walsh*, had got a bond for the conveyance, and that *Davis* had nothing to do with it. *Davis* then asked *Walsh* what he meant by having a bond of conveyance, as he, *Walsh*, was only the surety for *Stockton* who purchased it in trust for the wife of *Davis*? *Walsh* replied, he meant that *Stockton* had given it all up to him. *Davis* then told *Walsh* that when the first payment became due he expected to make the payment, and that he did not want *Walsh* to pay for him, to which *Walsh* answered with warmth that *Davis* had nothing to do with it. That *Stockton* (as *Davis* and wife are informed and believe,) being about to leave this state and go to *Pennsylvania*, where he now resides, was induced, in order to secure *Walsh*, to direct that *Dugan* should give the bond of conveyance to *Walsh*, *Walsh* at the same time assuring *Stockton* that no advantage should be taken thereof, but that whenever *Davis* paid the purchase money, the wife of *Davis* should have a deed executed to her for the same. That some months after the sale, *Davis* went to *Dugan*, and offered to pay him $200, which he had then ready to pay him, and to give *Dugan* security for the residue, provided he would give up the bonds which *Stockton* had executed, with *Walsh* as his surety, and offered to make payment of the residue in sixty days, but *Dugan* declared he could do nothing without consulting *Walsh*, and that he, *Dugan*, must make the conveyance to whomsoever *Stockton* directed, saying that he did not know *Davis* in the transaction, altho' at the same

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time *Dugan* acknowledged that he knew *Stockton* purchased the property for the wife of *Davis;* and that *Stockton* had so méntioned in his, *Dugan's* presence, to *Walsh*, and also that *Stockton* made *Walsh* promise that she should have it when *Davis* paid the money for which it was purchased. That *Davis* was always willing and desirous to have paid the purchase money according to the contract, and several times applied to *Dugan* on the subject, and also to *Walsh* as being the surety, for payment of the same. That *Dugan* always alleged that he did not know *Davis* in the business, and that he had conveyed, or must convey, the property to *Walsh;* and when *Davis* applied to *Walsh*, he insisted *Davis* had nothing to do with the property, and that it belonged to him, *Walsh*. That *Dugan* hath actually conveyed the house and garden, and the lot on which they are situate, to *Walsh;* and that sometime in June last *Walsh* claimed of *Davis* £30, as rent for one year for the premises, and distrained for the same, altho' *Davis* saith that he never rented the premises of *Walsh*, or agreed to pay him any rent therefor, but always claimed the same in consequence of the said purchase; and that *Davis* was obliged to replevy the goods so distrained by *Walsh*. That *Walsh* hath instituted an action of ejectment in the county court of *Baltimore* against *Davis*, to recover the possession of the four lots No. 951, 952, 953 and 954, which include the property so purchased by *Stockton*. That within the last thirty days *Walsh* also served *Davis* with a notice, as if he had been a tenant of *Walsh*, to leave the premises within thirty days from the notice, in order to institute proceedings against *Davis* under the act, entitled, "An act to provide a summary mode of recovering the possession of lands and tenements holden by tenants for years, or at will, after the expiration of their terms." That on the 15th of February last, *Davis* did actually tender to *Walsh* the whole amount of the principal and interest of the purchase money, for which *Stockton* purchased the property, and demanded that *Walsh* should convey the same to the wife of *Davis*, and that *Walsh* refused to receive the money, or execute a conveyance. *Prayer*, that *Davis* and wife may be quieted in their possession of the premises; and that *Walsh* may be compelled by a decree to convey to the wife of *Davis* the property so purchased by *Stockton* for her use. *Prayer* also for *subpena*,

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and for an *injunction*, &c. The *answer* of *Walsh*, the defendant, admits that *Davis* applied for the benefit of the insolvent law, and that the trustees named became entitled to his estate as the bill alleges, but the defendant has no knowledge whether any agreement ever took place between the complainants and *Dugan*, that in case the purchase money was obtained by them he was to convey the same to them. The defendant admits that the lots of ground mentioned were sold by *Dugan* at public sale as stated; and the defendant saith, that the complainant, *Mary*, came to him previous to the sale thereof, and mentioned to him that she and her husband were desirous of purchasing that part on which the improvements of a small house and garden were made, but expressed her apprehensions that they would be unable to accomplish the payments at the limited periods, and asked the defendant if he would consent to take the same to his own account, in case they were so unable, and the defendant did consent to do so. That at the sale of the property, which was distributed into three parts, the defendant became the purchaser of two third parts thereof, and that *Stockton* became the purchaser of the remaining third part, including the house and garden, as the defendant was informed and believes, in trust for *Davis*, in the event of his making the payments in 3, 6 and 9 months, that being the time limited at the sale thereof. That the defendant became the security of *Stockton* for the purchase money of the third part, to *Dugan*, and at that time also informed *Stockton* that he had made the promise, herein before stated, respecting the same, to Mrs. *Davis*. That before bonds for the conveyance of the lots of ground were executed by *Dugan*, the complainants severally came to the defendant, and informed him that they had determined not to have any thing to do with the purchase made by *Stockton*, and requested the defendant to take the whole upon himself, and obtain a bond in his own name for the conveyance thereof; at that time also the defendant consented to take the same upon himself, but observed to the complainant *Davis*, that it would be proper for him and *Stockton* to call on *Dugan* and request that the bond of conveyance should be executed to the defendant only. That shortly after this conversation, *Davis* and *Stockton* informed the defendant that they had waited on *Dugan* for that purpose. That at

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another day, previous to the execution of the bond of conveyance, *Davis*, in conversation with the defendant relative to the property, and in order to induce the defendant the more readily to take the purchase upon himself, informed him that *Peter Litzinger*, the proprietor of the adjoining ground, would sell the same on reasonable terms, and advised the defendant to purchase the same, as he would thereby obtain the whole front on both sides of the street; and the defendant did accordingly purchase the opposite front from *Litzinger*. The defendant afterwards obtained the bond of conveyance in his own name; that he was pressed to take the same both by *Stockton* and *Davis*. That at the stipulated periods he paid the purchase money to *Dugan*, and has since obtained conveyances in fee for the whole of the property; and at the request of *Stockton* executed to him a bond of indemnity against the payment of the purchase money to *Dugan*. That *Davis*, at the time of the sale of the property, was considerably indebted to the defendant for goods sold and delivered, and that on that account he is now indebted to the defendant in the sum of more than £50. That after the defendant made the first payment for the property to *Dugan*, he informed *Davis* that he must pay £30 per annum rent. That he always considered himself entitled to recover that sum, and that *Davis* was his tenant at that rent, and compellable to the payment thereof by distress. That under this impression, and in consequence of *Davis's* refusal to pay the same, he levied a distress, and instituted such process for the recovery of the possession of the property, as stated in the bill. The defendant doth positively deny that he either, directly or indirectly, ever promised or gave any other assurance to the complainants, or either of them, or to *Stockton*, that whenever they paid the purchase money he would execute a conveyance for the third, or any other part, to *Mary* one of the complainants. That he does not believe any tender of money, on account of the pretended claim of the complainants, was ever made to any person, until nearly two years after the sale, when *Davis* came to the defendant's house, and told him that he came to tender him money for the property now possessed by the complainants, when the defendant answered, that as he had neither sold, nor promised to sell him, any ground, he could not receive any on that account, but would be thankful to receive and

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apply the same to their credit for goods sold to Mrs. *Davis* two years before, which *Davis* refused, observing that that account should be paid in due time. That since the property hath been in the possession of *Davis*, the same hath suffered great injury, and the defendant has reason to apprehend, and doth believe, will be almost wholly ruined if suffered to remain with him; and the defendant is restrained from taking the possession thereof. The defendant doth positively aver, that he hath never, since the purchase of the property, promised or bound himself to permit the complainants the privilege of paying up the principal and interest of the purchase money, and taking the property; and expressly denies any trust whatever for their benefit. He denies the fraud and oppression charged by the complainants, &c.

A motion to dissolve the *injunction* was made by the defendant, which being submitted,

Hanson, Chancellor, stated, that the bill and answer were by him read and considered, and it appearing that the equity stated in the bill, on which the injunction was obtained, is fully denied by the answer; and there being no circumstances to induce the chancellor to continue the injunction until final hearing, or further order, it is adjudged and ordered, that the injunction be, and it is hereby dissolved.

Commissions issued for taking testimony, which were executed and returned, containing the following evidence.

Joseph Stockton He affirmed that in the year 1793 he was present at the sale of a house and lot situated on *Hampstead* Hill, at the head of *Bond*-street, in the city of *Baltimore*, that the sale was made by order of *Cumberland Dugan*, the owner of the property, under the superintendance of major *Yates*, an auctioneer; that at the time of the sale, the premises were divided into three parts or parcels; that the affirmant, at the instance and request of *Mary Davis*, one of the complainants, with the knowledge and approbation of her husband, the other complainant, became the purchaser of the first part or parcel of the premises, whereon a house and garden were erected and laid out; that at the time of the sale it was publicly announced by the auctioneer, and was understood by the defendant, who was present, that the affirmant made the

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purchase as agent, and for the use of the complainants, that the defendant became the purchaser of the other two lots, parts or parcels of the premises; that the affirmant bid £130 for the lot which he bought, and that the defendant bid a larger sum (how much the affirmant cannot recollect,) for the two parts which he bought. That the affirmant and *Walsh* became mutually bound for each other unto *Dugan*, for the price of their respective purchases. That a few days after the sale, when the affirmant was about to leave *Baltimore*, it was agreed, by and with the knowledge and consent of all the parties, that *Dugan* should convey the whole of the premises, as well the lot purchased by the affirmant, as the other two lots, to the defendant; that when such conveyance was agreed upon, *Davis* declared it was done in confidence, and, as the affirmant understood, upon trust, that so soon as the defendant should be relieved from his suretyship on account of the lot purchased by the affirmant, the same should be vested in the complainants, for whose use it had been purchased; that the affirmant directed such conveyance to be made accordingly, and never understood or intended that the same should convey any other property or interest in the lot by him purchased as aforesaid, but on the terms, and for the purpose of indemnifying the defendant against the security into which he had entered as aforesaid. That at the time of entering into the security, mutually for each other, to *Dugan*, the affirmant received a bond from the defendant in the penal sum of £600, conditioned to indemnify this affirmant against the bonds which he had executed to *Dugan* for the purchase of the premises; that some time in the year 1795, subsequent to the commencement of the present suit, the defendant called upon the affirmant in *Philadelphia*, (where the affirmant then lived,) and produced and delivered up to the affirmant the bonds executed to *Dugan*, whereupon the affirmant delivered to the defendant the bond which the affirmant had received from him to indemnify the affirmant as aforesaid. That the complainants were in possession of the premises at the time of the sale, and continued so when the affirmant left *Baltimore*, with the knowledge, and as he believes with the approbation of the defendant.

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James Gottier. He deposed, that sometime in the year 1793, soon after the sale of *Dugan's* property, the deponent, and *Ebenezer Graves*, were requested by the complainants to make a tender of the purchase money of the house and lot, which *Stockton* had bought for them at the said sale; that the complainants accordingly gave to the deponent and *Graves* the sum of £185, with an additional sum for interest, in order to make such tender. That the deponent and *Graves* made the first tender of the money to *Dugan*, but he said that he had already conveyed the premises to *Walsh*, and supposed that he would take the money. That the deponent and *Graves* then proceeded to the house of *Walsh*, and informed him that they were come to make payment for the house and lot which *Stockton* had purchased for *Davis* and his wife, who had given the money for that purpose; that the deponent and *Graves* tendered the sum, and interest aforesaid, and requested *Walsh* to count the same: that *Walsh* declared he had no doubt about the quality or quantity of the money, but observed that he had bought the premises for himself, and did not mean to sell again.

Ebenezer Graves. He deposed to the same effect above deposed by *Gottier*, fixing the time of the tender to the 15th of February 1794, as made to *Dugan*, and on the next day to *Walsh*.

Colonel *Thomas Yates.* He deposed that at the time he went to make the sale for *Cumberland Dugan*, the complainants both expressed their desire to become purchasers of that part of the property which included the house and garden, and that they should request Mr. *Stockton* to purchase the same for them, provided it did not go too high. He thinks *Walsh* and *Dugan* were present at the time of this conversation. The lots were laid off in three divisions, one of which division was to include the house and garden, to accommodate the complainants if they were able to purchase, and with the consent of *Dugan*, and made from the deponent's recommendation to *Dugan* at the desire of *Davis*. It was understood by the deponent that *Stockton* was bidding for the said part for *Davis* or wife, and believes it was so understood by *Walsh* and *Dugan*, as it was a subject of conversation at the time of the sale, and *Dugan* had consented to the division to accommodate *Davis* in the purchase, but he has no knowledge of their being acquainted with *Stockton's*

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bidding for *Davis* or wife, other than his belief, founded on the circumstances already stated. He heard *Walsh*, sometime after the sale, inform *Dugan* that he had become security for *Stockton*, who being unable to pay, had directed the conveyance to be made for said part by *Dugan* to him *Walsh*.

Cumberland Dugan. He deposed that he purchased the property under an agreement to let *Davis* have the same, provided he paid the purchase money, and £50 to the deponent for his trouble, within twenty months from the day of sale; and if the purchase money and the £50, were not paid by that time, the property was to be sold by the deponent, and the proceeds of the sale, if it exceeded the purchase money, and £50, were to be paid to *Davis*. That *Davis* and wife did express their desire to the deponent to preserve the house and garden for themselves, but he does not recollect that they mentioned it to *Walsh* or *Yates*. He does not know who applied to him for the purpose of subdividing the lots, but it was concluded upon between him and Col. *Yates*, that the property would sell better if it was so subdivided; and believes the subdivision was so made, in order to afford the complainants, or one of them, an opportunity to purchase in the division containing the house and garden. He does not recollect that it was declared, at the time of the sale, that *Stockton* bid for the said subdivision for the use and benefit of *Davis* and his wife, or one of them, but immediately after the sale *Stockton* said he had purchased for *Davis* and wife, with an intention to let them have the property, if they complied with the terms of sale; but he does not know whether the same was known by *Walsh*. That immediately after the sale, the deponent called on *Walsh* and *Stockton* to execute bonds agreeably to the terms of the sale, which they accordingly did, being securities for each other; and the deponent told them they might have bonds of conveyance when they pleased. Some days after the taking of which bonds, *Stockton* called on the deponent, and directed him to execute a bond of conveyance for the whole of the said lots to *Walsh*. The deponent did so, and the purchase money was paid to him by *Walsh*, to whom he executed conveyances. That sometime before the executing the said bond of conveyance, *Davis*, or his wife, called on the deponent, and told him it was perfectly agreeable that a bond

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of conveyance should be given to *Walsh* for the whole of the property; and the deponent understood that the complainants and defendant were then on good terms. He believes that *Walsh* did know, or had been informed, at or before the time when the bond of conveyance was executed, that *Stockton* purchased the property for *Davis* or wife. He believes that *Davis* called on him a short time before the first payment became due, and after the bond of conveyance had been given to *Walsh*, and said he would pay him $200, and give him security for the remainder, but the deponent said he could not do any thing in it, because the bond was nearly due, and he expected to get the whole when it became due.

Job Garretson. He deposed that it was publicly said at the sale that *Stockton* bid for Mrs. *Davis;* that the deponent so understood it himself, and supposed it to be so understood by others, from the general conversation, and he believes it was so understood by *Walsh* and *Dugan*, and that *Dugan* told the deponent so. That at the time of the sale, *Stockton* told the deponent that *Walsh* had agreed to be security for him if he bought the property. That *Dugan* told the deponent that he supposed *Walsh* would be security for *Stockton*. *Walsh* afterwards said to deponent, he thought it was a pity that *Davis* and wife should be put out of the property, and that he had become security for the payment of the money, and that when they paid the money the property was theirs. That a few days before *Stockton* went away, *Dugan* told the deponent that *Stockton* had a bond of conveyance, and that he might deed or assign it to *Walsh*, but whenever the money was paid, the property would be theirs, meaning *Davis* and wife. That *Stockton*, a little before, informed the deponent, that he was a good deal uneasy about his being security for *Davis* for the purchase money of the said house and garden; that he was going to leave the place in a few days, and had a mind to let *Walsh* have it, and whenever *Davis* and wife paid the money, *Walsh* would let them have the property. On the deponent informing *Dugan* of this conversation, the preceding conversation with *Dugan* took place.

It was admitted that *Davis* remained in possession of the house and garden, until he was turned out by a writ of *habere facias possessionem*, issued on a judgment at law obtained against him at the suit of *Walsh's* lessee. That *Stockton*

removed out of the state shortly after the purchase, and before any part of the purchase money was paid. That the sale made by *Dugan* was after the time of the purchase made of *Davis's* trustees.

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Hanson, Chancellor, (December term, 1805.) The cause standing ready for hearing, has been debated by the counsel on each side*(a)*, and the whole by the chancellor carefully considered.

How often does the chancellor think it proper to mention the principle on which the statute of frauds was framed, and principles in this court established. There is in this case no agreement, that the chancellor perceives. Is it necessary to say that a contract is a stipulation or agreement, or understanding, between two persons, each of whom is bound to do something on his part, and that if one is not bound, he has no right to consider the other as bound? It is true, that an express contract may be so made, as that one shall for a consideration be bound, and the other not bound without his own will. For instance, A and B make this agreement—A binds himself for the consideration of 10 dollars, before the 25th of December, to procure to B 10 hogs, for which, if B likes them, and chooses to take them, he shall pay at the rate of $8 per 100 wt. In this case agreement is clear, A is bound to bring the hogs; but it is at the election of B to take or reject them as he thinks proper, losing his $10. But if there be no consideration to A, it is not to be supposed that he is bound to bring the hogs, and B not bound to take them. This may indeed be considered as illustrating by the thing itself. Let it be said then, that in the present case there was, on the part of the complainants, no contract. There was no *actus contra actum*; there was no consideration flowing from them; there was nothing binding on them.

It has been contended, that *Stockton* only acted as trustee for the complainants, and purchased for them. But is there any proof, or even allegation, that he purchased with their money, or that they were bound to provide the money, or take the purchase from them? It has been insisted too, that as he made the contract in his own name,

(a) *Martin*, (Attorney General,) for the complainants, and *Winchester*, for the defendant.

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the property was to be considered as a security in the hands of him, the nominal purchaser, and that as this was the case, the time stipulated for redeeming it was to be considered in the same light as the day of redemption mentioned in a common mortgage. There is no analogy, and it is not to be conceived that this court ought to determine, that although there was no consideration flowing from the complainants, and although there was nothing binding on them, *Stockton* should be obliged to convey to them at any time, when they should find it convenient to pay the money; and that at any period after the time stipulated, whoever should hold the property from, by, or under *Stockton*, after even twenty mesne transfers, should hold it subject to the will of the complainants to redeem it at any time. How would such doctrine comport with the interests of a young thriving town?

The chancellor does not conceive there is any solidity in the observation respecting answers in this court. The distinction is plain. Where a defendant first admits the allegations in a bill, and then sets up some distinct *after* transaction, by way of avoidance, he is bound to prove that transaction. But where a man is called on by a bill in this court to say whether or not there was an agreement between him and the complainant, and what it was, his answer, with respect to the nature of that agreement, is to be taken altogether. For instance, says the bill of A—B contracted with me, by parol, for the consideration of $5000, to sell me 360 acres of land in *Baltimore* county, of which he put me in possession, but I was to have credit for five years without paying interest. B, in his answer, admits that there was a parol contract for the land, and possession given as stated; but instead of having credit as aforesaid without interest, A was to give him bond, with security, for paying with interest in three years. Will common sense suffer a construction as, that because B admits a contract and possession he must be considered to have admitted every thing necessary for A's purpose, unless he can prove, on commission, that the contract was as stated in the answer? No! the absurdity is glaring. But if B had admitted the matters stated in the bill to be facts, but went on and said that afterwards, A, for the consideration of $100, had agreed to give up the purchase, &c. that

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part of the answer must be proved on commission, unless A, on interrogatories, had admitted its truth.

The chancellor thinks proper to make a remark, which ought to have come before—supposing *Stockton* really bound to convey on receiving the purchase money on or before such a day, inasmuch as the complainants were under no obligation whatever to take the purchase off *Stockton's* hands, and inasmuch as he had no valuable consideration, the utmost they could claim in reason would be to take the purchase off his hands by paying the money on the day stipulated. Suppose this case—they do not bring him the money on that day—property has fallen so much in value that it is not for their interest to take it on or before the day. He cannot compel them to take it. He does not wish to keep it, but to get free of it on the best terms. He sells it for $500 less than it cost him. Ten years after this the property is worth three times as much as it cost *Stockton*. Then, indeed, *Davis* and wife, whether or not they have money, can contrive to redeem, or claim it to advantage, provided it can be so redeemed or claimed. Well—the purchaser from *Stockton*, or the purchaser from that purchaser, or the purchaser from the second purchaser, is obliged, on *Davis's* application, to convey him the property on his paying, &c. It is really an affront to common sense to say that *Davis's* claim ought to prevail.

The chancellor has given his ideas at large. He might refer to decisions of the court of appeals, which if there be a judgment to be formed from decrees, the reasons of which are not assigned, are more strict with respect to agreements set up against the intent of the statute of frauds than the chancellor has ever seen.

The chancellor indeed has always thought that it would have been much better to construe the statute of frauds *strictly* against contracts. However he has always endeavoured to conform to decisions, which on any principle might be considered as binding on him. He has never intentionally decided against any decree of the Lord Chancellor of *England*, made before the revolution, or even any decision of Chancellor *Rogers*, which hath not been controverted, unless on a bill of review. As to the present case, he is satisfied, that by decreeing a dismission of the bill, he will contravene the principle of no decision in equity, which ever hath been given. *Decreed*, that the bill of

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the complainants be dismissed, and the defendant be dismissed, but without costs.

From which decree the complainants appealed to this court. And the case was argued before Chase, Ch. J. Nicholson, and Gantt, J. by

Martin, for the Appellants; and by
Harper, for the Appellee.

The Court *Reversed* the decree of the court of chancery, and decreed that the appellee convey the land in question to the appellants, in fee simple, and pay to them all the costs in the court of chancery, and in this court, and all the costs incurred by *Davis* at law in defending the action of ejectment prosecuted against him by the appellee, and that the appellee restore the possession of the land to the appellants. Also that an account be taken of the principal money and interest paid by the appellee for the land, at the respective times he paid the same, and that the appellants be charged therewith; and that an account also be taken of the rents and profits of the land, which have accrued and been received by the appellee since he took possession thereof; and in stating the account between the parties, the appellee be charged therewith at the respective times he received the same, with legal interest thereon; and that the balance of the money which may be due, on the adjustment of the said account, be paid to the party to whom it shall be due, whether appellants or appellee, at the time the appellee shall convey the land. And that the chancellor make all necessary rules and orders for having this decree carried into full and complete effect.

DECREE REVERSED.

DECEMBER.

M'Coy, Garn. of Kingla, vs. Swan's Adm'x.

An administrator may issue an attachment or warrant under the act of 1795, ch. 56.

Appeal from *Washington* County Court. This was an *attachment* on warrant under the act of 1795, *ch.* 56; and the *affidavit*, on which the warrant was granted, was made by the administratrix, stating that *Kingla*, (the original defendant.) was *bona fide* indebted to her, as administratrix, on two promissory notes drawn by *Kingla*, and

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payable to her intestate, or order, &c. The attachment was laid in the hands of *M'Coy*, (the appellant,) who appeared, and moved that the proceedings on the attachment might be quashed. But the county court refused to grant the motion, and judgment of condemnation was rendered, &c. From that judgment this appeal was prosecuted.

The case was submitted to the court without argument.

T. Buchanan, for the Appellant.
Hughes, for the Appellee.

JUDGMENT AFFIRMED.

DAVIS vs. WILSON, *et al.*

DECEMBER.

A paper certified in a record transmitted on appeal, purporting to be a bill of exceptions taken at the trial, was held not to be a bill of exceptions in the case, it not appearing that the seals of the judges of the court below had been affixed to it.

The court of appeals having reversed a judgment of the court below, on the form of proceedings, there being a material variance between the writ and the declaration refused to remit the record with a *procedendo*.

APPEAL from the County Court of *Baltimore*. The record in this case contained a *bill of exceptions*, tendered to the associate justices of the county court by the defendant, (the appellant,) and which was signed, but not *sealed*, by the justices.

W. Dorsey and *Brice*, for the Appellant, contended, that there was a material variance between the writ and the declaration; the former being in the names of *William Wilson*, and others, and the latter in that of *William Wilson* alone.

They were proceeding to argue the points raised on the *bill of exceptions*, when it was discovered that it had not been sealed, as before stated.

THE COURT were about to reverse the judgment on the *form of proceedings*, and to award a *procedendo*, when

W. Dorsey contended, that a *procedendo* ought not to be awarded in a case where the court do not reverse on a bill of exceptions.

THE COURT considered that there was no *bill of exceptions* in the case, the seals of the justices not being affixed thereto; but there was error in the form of proceeding, and reversed the judgment without awarding a *procedendo*.

JUDGMENT REVERSED.

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Wagner vs M'Donald

A paper was exhibited for record as the last will of *C W*, proved to have been signed by him at a time when he was about to leave the state. It was written somewhat in the form of a letter, and stated "If I should not come to you again, my son *M* shall pay," &c Evidence was given that *C W* went to *Kentucky*, and returned, and that he lived for several weeks thereafter—*Held*, that the paper could not be admitted to record as the last will of *C W*.

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APPEAL from the Orphans Court of *Frederick* county. A paper, purporting to be the will of *Michael Wagner*, written in the *Dutch* language, of which the following is a translation, was exhibited to the orphans court for record by the appellee, who had married *Elizabeth Schreiner*, one of the legatees therein named, viz. "In the name of God, Amen. If I should not come to you again, my son *Michael Wagner* shall pay, out of *Christian Wagner's* bond, which I have from him, to *Elizabeth Schreiner* seventy pounds, and that in the year 1798, the 10th of May; and to *Michael Roether* thirty pounds in the year 1799, the 10th of May. The remaining fifty pounds you shall divide amongst you; that is, *Michael Wagner* and *John Wagner*, and *Christian Wagner* and *Roether's* children, and *Catherine Schreiner's* 3 children, and the money shall be put on interest till they come of age. Farther what I yet have with *Christian*, that is, 1 cow, 1 house clock, bed and bedsteads, clothes press, table, copper kettle, bible, of these *Eve Sherman* shall have share too like the rest. So much from me.

Michael Wagner.

May 4th, 1795."

A *citation* was ordered and issued for the representatives of the deceased, &c. Proof was made of the handwriting of *Michael Wagner*, (deceased,) and that he was, in the year 1795, of sound disposing mind, memory and understanding. It was also proved that he lived with *Christian Wagner* in *Liberty* Town, and went to *Kentucky* in the spring, about the 7th or 8th of *May* 1795, and returned to *Christian Wagner's* after harvest in the same year, and said on his return that he was well; that he continued so for four days, and after that he lay sick three weeks, when he died. The orphans court decreed that the paper should be recorded as the last will of *Michael Wagner*, deceased. From this decree this appeal was brought by *Christian Wagner*, who (among others,) had been summoned, but who alone appeared to and contested the proceedings.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J.

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Taney, for the Appellant, contended that the paper exhibited was to take effect as a will if the writer did not return; and as he did return, it can have no effect. A will to take effect on a contingency, has none if the contingency does not happen. *Parsons vs. Lanoe*, 1 *Ves.* 190. S. C. *Amb.* 557. *Lugg vs. Lugg*, 2 *Salk.* 592. S. C. 1 *Ld. Raym.* 441.

Shaaff. for the Appellee, contended, that it did not appear that the appellant had any interest in or right under the will to justify his contesting its being admitted to record, and appealing to this court from the decision of the orphans court. He admitted that the orphans court were wrong in their decision.

DECREE REVERSED.

HAY, *et al.* vs. CONNER. DECEMBER.

Where a mother, as the *natural* guardian of her infant children, who were under the age of 14 years, hired a slave belonging to them, to a sea captain, to perform a voyage on wages, the slave to be returned, &c. and the vessel being sold at the port to which she sailed, by her owners, the slave was put by the captain on board of another vessel bound home, and furnished with provisions for the voyage, but never returned home. In an action of *trover* by the children, prosecuting by their *prochein amy*, against the captain, for the value of the slave—*Held*, that the action was well brought.

APPEAL from *Baltimore* County Court. The appellants, by their *next friend*, brought an action of *trover* in that court against the appellee, for the conversion of a mulatto male slave called *James Perry*. The general issue was pleaded. The facts are stated in the following opinion of the county court, delivered at the trial in February 1802, by

H. RIDGELY, Ch. J. In this case the evidence offered to the jury is, that *John Hay*, deceased, father of the plaintiffs, in his life-time executed a bill of sale to the plaintiffs, who were and still are infants under the age of twenty-one years, by which he sold to them a negro slave by the name of *James Perry*, (who is the slave mentioned in the declaration;) that *John Hay* departed this life intestate, leaving his said infant children in the care and under the protection of their mother, *Martha Hay;* that *Martha Hay* afterwards took upon herself to hire for wages the negro slave, *James Perry*, to the defendant, Captain *Conner*, to perform a voyage from *Baltimore* to *Hamburg*, and thence back to *Baltimore*, as a cook on board the ship *Mary*, which the defendant commanded in the voyage. The slave's name was signed under the ship's articles, in pursuance of the said hiring, as a cook; and that the defendant promised *Martha Hay* that he would bring back the

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negro, or pay her a generous price for him, in case he should not. The ship *Mary*, on her arrival at *Hamburg*, in the prosecution of her voyage, was sold by the orders of her owner. The negro slave was, after the sale of the ship, put by the defendant on board the ship *Fidelity*, Captain *Weems*, bound to *Baltimore*, and the defendant furnished him with provisions for said voyage. It is admitted that the plaintiffs, at the time of the hiring of the slave by their mother, were the legal and sole proprietors of the said slave, and that the mother of the plaintiffs was not appointed the guardian of the plaintiffs, or either of them, by their father, or by the orphans court, and that they, at the time of the hiring, were under the age of fourteen. It is also admitted, that an action of assumpsit has been instituted in this court, and a recovery had for the slave's wages for said voyage, against the defendant, by *Martha Hay*; and now the present action is brought to recover the value of the slave, upon the ground that this slave has been converted by the defendant to his own use. The great question then, upon which this case depends is, whether under a view of these circumstances the defendant is guilty of a conversion? If he is, the plaintiffs are entitled to a verdict; if he is not, the verdict ought to be for the defendant.

It remains to be considered how this slave came on board the defendant's ship, by what authority he was shipped, and in what capacity he was received by the defendant? He was shipped by *Martha Hay*, at and for the wages of 20 dollars per month, for the voyage. He was received by the defendant at and for these wages to perform the voyage. Who was the contract between? The defendant on the one part, and *Martha Hay* on the other—The slave was no party to the contract. It is a mutual contract binding both the parties; on the part of *Martha Hay*, that the slave should perform the voyage; on the part of the defendant, that he would pay the wages. This I take to be the substance of the contract. Then, had *Martha Hay* power to make this contract? It results, from the relation in which she stands to the plaintiffs, that she had. She is their guardian by nature; as guardian by nature, she has the custody of the persons of her children, and the management of their personal property, and she is accountable to them for the profits. It follows then that she has a right, and

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is bound to use the property in such a way as to make it most productive; but she cannot vest the right of property in any other person, or change the species of property, that being in her children, from whom that right cannot be taken without their consent, and they are not capable of giving that consent until they arrive at the age of twenty-one. I hold that the contract is valid and binding on the parties; each had a right and a legal capacity to make it. What legal obligations are imposed on *Martha Hay* by this contract? I take it she is bound and answerable that her slave shall conduct himself, as other seamen do in similar stations on board a ship; on the other hand, the defendant is bound by the contract to conduct towards the slave in the same manner, in every respect, as to other seamen, and if he deserts the ship, Mrs. *Hay* is liable to all such losses as would result to a free mariner who should, under the same circumstances, desert his ship. I mention the contract thus particularly, and its legal operation on both the parties, to show that this slave was shipped or hired by a person having proper authority, and that the defendant did no wrong, and was justified in receiving and employing him in the manner he did, and so far was not guilty of a tort. Is there any thing in the defendant's conduct afterwards that can make him guilty of a tort? Had he a right to send the slave back in another vessel? If he had a right to send the other seamen back in another vessel, he had a right to send the slave back in the same way. The act of congress has thought it a reasonable way, and it is a good rule for us. Did he pay him the two months wages? It is right and proper he should not have paid them; if he had he would have been bound to pay them again to Mrs. *Hay*, with whom the contract was made. *Perry* was a slave, and could do no act, but such as Mrs. *Hay* authorised him to do. The defendant put the slave on board Captain *Weems*, bound for *Baltimore*, to be brought back; by the act of God the vessel was driven out of her course, and compelled to go to one of the Islands. This was no wrong by the defendant. But when there, *Perry* makes his escape. Is this the wrong of the defendant? We think not. Suppose *Perry* had ran from the ship, and drowned himself, would the defendant be answerable? Would it be a conversion? No. Suppose he had, when compelled to go to this Island, committed an offence against the laws

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of the state, and was imprisoned, would the defendant be answerable? No. Suppose the slave had taken a knife and cut his own throat, would it be said that the defendant ought to have been standing always by to arrest the blow, and that he, having neglected to do this, is answerable? No. Upon the whole, we think that *Martha Hay* had a right to hire, and that there was no wrong in the defendant in receiving the slave on board as a seaman; that the defendant did all he was bound to do afterwards to ensure the return of the slave, and if he deserted, it was not the defendant's fault; and therefore, it is the opinion of the court, that the defendant is not guilty of a conversion upon the facts so offered and admitted to be proved to the jury. The plaintiffs excepted; and the verdict and judgment being for the defendant, the plaintiffs appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J.

Brice, for the Appellants, stated, that the principal questions were—1. Whether Mrs. *Hay*, the mother, was guardian by nature, if so, whether as such she had any such power over the property of the children? And 2. Admitting she had such power, whether the defendant has not, by putting the slave in the custody of another person without the knowledge or consent of Mrs. *Hay*, or her children, exercised such an act of ownership over the slave as to amount to a conversion? As to the *first* question, he cited *Fonbl.* 247. *Co. Litt.* 119, b. *(note* B*)* *Brown's Civil Law*, 131; and the act of 1798, *ch.* 101.

Purviance, and *S. Chase*, Jr. for the Appellee.

THE COURT said, the action of trover was well brought, and reversed the judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

FAGET VS. BRAYTON.

If the declaration in an action of replevin does not allege damage to have been sustained, it is fatal

APPEAL from *Baltimore* County Court. *Replevin* for a cow. The declaration did not allege any damage to have

to have the declaration in replevin stated the taking of the property to be in *Gay-street*, from the dwelling-house of the plaintiff—*Held*, that evidence of the defendant's having taken the property in *Gay-street*, was sufficient without proving that he took it from the dwelling-house of the plaintiff.

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been sustained by the plaintiff, (now appellee.) At the trial the defendant, (the appellant,) prayed the court to direct the jury, that as the plaintiff had declared the taking of the cow in question to have been in *Gay-street*, from the dwelling-house of the plaintiff, it was incumbent on him, in order to entitle him to recover, not only to prove that the taking was in *Gay-street*, but to prove that it was from the house of the plaintiff in that street. The court, *(H. Ridgely*, Ch. J.*)* refused to give this direction, but did direct the jury, that if they should be of opinion that the defendant took the cow of the plaintiff in *Gay street*, that was sufficient to entitle the plaintiff to recover. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

Purviance, for the Appellant.
Martin, *Winder*, and *Rogers*, for the Appellee.

The Court concurred with the county court in the opinion expressed in the *bill of exceptions;* but reversed the judgment, because no damages were laid in the declaration.

JUDGMENT REVERSED.

Hogmire, *et al.* vs. M'Coy.

December.

In an action of trespass *q c f* the plaintiff offered to prove that he was in possession of the land on which the trespass was alleged to have been committed, and that the defendant committed the trespass complained of on the land so in the possession of the plaintiff, at the place by him located on the plots in the cause—*Held*, that such evidence was admissible.

The plaintiff proved by a witness that he was present when the land, on which the trespass was alleged to have been committed, was originally located or taken up, and that it was then located, as it now is, on the plots—*Held*, that the evidence was admissible to prove the original beginning and location of the tract of land.

Appeal from *Washington* County Court. The appellants brought an action of *trespass q. c. f.* against the appellee. The general issue was pleaded, and plots were returned.

1. At the trial the plaintiffs offered to prove, by a competent witness, that they were in possession of the tract of land called *Long Timber*, mentioned in the declaration, and on which the trespass was alleged to have been committed, as located on the plots by the plaintiffs; and that the defendant committed the trespass mentioned in the declaration, on the land so in possession of the plaintiffs, at the place located by them on the plots. This testimony the county court, *(Clagett*, Ch. J.*)* refused to admit to be given to the jury. The plaintiffs excepted.

2. The plaintiffs also offered to prove, by a competent witness, that he, the witness, was present when the tract of land called *Long Timber* was originally located or taken up, and that the tract was then located, as now lo-

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cated by the plaintiffs on the plots, and then prayed the court to direct the jury, that this testimony was admissible to prove the original beginning and location of the land, in order to support the plaintiffs' action. But the county court refused to admit the testimony. The plaintiffs excepted; and the verdict and judgment being against them, they prosecuted this appeal.

Hughes, for the Appellants.

T. Buchanan, *Brooke* and *Lawrence*, for the Appellee.

THE COURT dissented from the opinions expressed by the county court in both of the bills of exceptions.

JUDGMENT REVERSED.

DECEMBER.

CUSHMAN vs. SIM's Adm'r.

In *assumpsit* for one years services as an overseer, and a *quantum meruit* for the same services—*Held*, that if there was a special agreement between the plaintiff and defendant for the plaintiff's services as an overseer, the plaintiff could not recover upon his declaration.

APPEAL from *Frederick* county court. This was an action of *assumpsit*, and the declaration contained two counts—The first for one year's service by the plaintiff, (now appellant,) as an overseer, in the year 1791, rendered the intestate of the defendant, (the appellee,) and the other a *quantum meruit* for serving the intestate as an overseer for one year. The general issue was pleaded; and at the trial the plaintiff offered in evidence, that he had acted as overseer for the intestate during the year 1791, and proved the value of such services. The defendant then gave in evidence, on cross examination of the plaintiff's witness, the declaration of the plaintiff, that he was to receive of the intestate a share of the crop made on the land for his services in that year, and that the plaintiff had received his share of the corn crop; but the defendant offered no evidence of a further agreement, nor of what share or proportion of the crop the plaintiff was to receive, or that the defendant had performed his part of such special agreement. The defendant then prayed the court to direct the jury, that if they were of opinion from the evidence, that there was any special agreement between the plaintiff and the defendant's intestate, for his services as an overseer for the year 1791, the plaintiff was not entitled to recover on the declaration in this cause; which opinion and direction the court, (*Clagett* Ch. J.) gave. The plaintiff excepted; and

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the verdict and judgment being against him, he appea'ed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J.

Taney, for the Appellant, cited *Payne, et al. vs. Bacomb*, 2 *Doug.* 651.

Shaaff, for the Appellee, cited *Esp.* 138, and *Hannan vs. Lee*, 1 *Harr. & Johns.* 131.

THE COURT said, that in the case of *Payne, et al. vs. Bacomb*, there was a count on a special agreement, and other counts, and as no agreement was proved, the plaintiff was permitted to recover on the other counts.

JUDGMENT AFFIRMED.

RUTTER VS. BLAKE. DECEMBER.

If the seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be different, the purchaser may return the goods, and recover back the money, in an action for money had and received; or he may have his action without a return of the goods, if he give notice to the seller where they are deposited.

If A sells a horse to B, affirming him to be sound—B receives the horse, and sets out on a journey, but finds the horse to be unsound, and leaves him on the road, he may recover back the money paid, in an action for money had and received, if he gives notice to A where the horse is, and he is not bound to return the horse.

But if B gives no notice to A, but sends the horse to vendue, and sells him for half what he gave, B has elected to abide by his contract, and he cannot resort to A to make good the difference of price.

APPEAL from *Baltimore* county court. The appellee brought an action of *assumpsit* against the appellant, on a promissory note drawn, on the 4th of July 1800, by him and *Edward Rutter*, deceased, whom he survived, for $1012 50, payable sixty days after date to *Edward Johnson*, or order, and by him endorsed to *William MacCreery*, or order, and by him endorsed to the appellee. The general issue was pleaded; and at the trial, the plaintiff produced and read the note in evidence. The defendant then offered in evidence an agreement made between him and the plaintiff, viz. That the promissory note, declared on in this case, was given for goods purchased by the defendant, and *E. Rutter*, (since deceased,) of the plaintiff. That the defendant, in the trial of this cause, may inquire into and offer evidence of the consideration of the note, and avail himself of the want of consideration for the whole, or any part of the note, as fully as the defendant might legally do, if the note had been originally given by *T. & E. Rutter* to the plaintiff, and the plaintiff had brought his action as payee of the note against the defendant. The defendant further offered evidence to prove, that he and *E. Rutter*, on the 1st of March 1800, at *Baltimore*

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county, purchased three bales of blue *Guerrahs*, and that the note, with the indorsements, was given by *T. & E. Rutter* to the plaintiff, to secure the payment of the purchase money of these goods. That *E. Rutter*, since the execution of the note, died; and that *T. & E. Rutter* did not, at the time of the sale, or at any time previous to the arrival of the goods in the *West Indies*, as hereafter stated, examine the goods. That *T. & E. Rutter* shipped the goods to the Island of *Currocoa*, in the *West Indies*, and there sold them on the 2d of April 1800, for and on their account. That the three bales of goods were not blue *Guerrahs*, but goods of a different and inferior quality. That *T. & E. Rutter* had sustained damage and loss, by reason of the false representation and warranty made by the plaintiff, in the sale of the goods. The plaintiff then prayed the court to direct the jury, that if they should be of opinion, that the defendant and *E. Rutter* did receive and make sale of the goods in *Currocoa*, on their own account, and for their own use, the defendant is not in law entitled to any deduction for any loss or damage sustained by the defendant and *E. Rutter*, in consequence of any warranty of the goods by the plaintiff. The county court, (*H. Ridgely*, Ch. J.) delivered the following opinion: Generally, in the sale of goods, if the seller affirms them to be of a particular quality, and the buyer receives them upon the credit of this affirmation, and they afterwards appear to be different from what they were affirmed to be, the purchaser may return the goods, and recover back the money, in an action for money had and received, or he may even have his action without a return of the goods, if he give notice to the seller where they are deposited. As, where A sells a horse to B, affirming him to be sound, B receives the horse, and sets out on a journey, but finds the horse to be unsound, and leaves him on the road, he may recover back the money he paid for him, in an action for money had and received, if he gives notice to the seller where the horse is, and he is not bound to return the horse. It was the conduct of the seller that was the original cause of the horse being at a distance and out of his possession, and he must put up with the loss and inconvenience. So if a merchant in *Baltimore* buys goods, the seller warranting them to be of a particular description of quality, and the merchant, with-

out examining, sends them to the *West Indies*, where upon opening he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover back the money paid for them, in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages for the full amount of the injury he has sustained, nor is he obliged to return the goods, or put himself to any further expense or trouble about them. This, I take it, was exactly the defendant's situation when the goods arrived in the *West Indies*. He had his option to do one of two things; first, to refuse to keep the goods, declining to go on with the purchase; or secondly, to accept the goods in lieu of those sold him, and to confirm the purchase by going on to sell them, and receiving the amount of sales. What does he do? Why he adopts the latter of the two alternatives—He sells the goods, and receives the money—not as agent for the seller, that is not intended, but upon his own account. This mode of proceeding by the defendant, however hard it bears upon him, I am of opinion has deprived him of a remedy here upon the warranty. Let us suppose A to sell a horse to B, with warranty that he is sound. B receives the horse, and riding him home discovers him to be unsound, and says nothing of this to A, but sends the horse to vendue, and sells him for half what he gave for him. Here he has elected to abide by his contract, and I take it he can never resort to the original seller to make good the difference of price. I think the cases I have put are similar to the case before the court, and that the warranty, if any made, cannot avail the defendant so as to entitle him to a deduction of the warranty for any damage or loss by him sustained. Suppose the plaintiff had received the goods on sale, with warranty to him, and has paid the amount—if he does not recover of the defendant, neither can he recover of the person who sold them to him; the defendant has put it out of the plaintiff's power; for the defendant, having sold the goods, the plaintiff cannot return them, or give notice to the person who sold them to him where they are. Therefore it may be that the plaintiff paid the price of first quality goods; and if he should not be permitted to recover against the defendant, he will lose the difference of price between goods of the best and goods of inferior quality. Whereas,

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had the goods not been disposed of by the defendant, the plaintiff could have returned or given notice where the goods were stored, and recovered over from the person who sold to him. It is true, that if at the time of making this note any particular agreement or understanding took place between the plaintiff, or his agent *MacCreery*, and the defendant, that a deduction should be made on account of any defect in the goods, that the defendant has his remedy in equity by making them parties, or in *this court*, if he can prove the note was delivered with such intention or understanding of the parties. The defendant excepted, and the verdict and judgment being against him, he brought this appeal.

The case was submitted to the court without argument.

W. Dorsey, for the Appellant.

Purviance and *S. Chase*, Jr. for the Appellee.

JUDGMENT AFFIRMED.

DECEMBER.

DRURY & BENNETT vs. NEGRO GRACE.

Where the limitation over is in fee after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable.

In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail, unless such intention is opposed by some rule of law.

APPEAL from *Anne-Arundel* County Court. In this case the appellee petitioned for her freedom, and the following case was stated for the opinion of the county court. *Zebedee Wood*, being possessed of sundry negro slaves, and among others of the petitioner, on the 10th of February 1788, duly made his last will and testament, containing this clause—"I devise and bequeath the whole of my property, real and personal, to my beloved daughter *Mary Ann Wood*, to her and her heirs for ever, *and in case she dies without lawful issue*, then the whole of my said property is to be possessed by my dear wife *Ann*, during her widowhood, and no longer, and at her death or marriage to be sold at public sale, and five hundred pounds current money, out of the money arising therefrom, to be

Z W, by his will, devised as follows: "I devise the whole of my property, real and personal, to my beloved daughter M W, to her and her heirs for ever; and in case she dies without lawful issue, then the whole of my said property is to be possessed by my dear *wife A. during her widowhood*, and no longer, and at her death or marriage, to be sold at public sale, and the money arising therefrom to be equally divided between B, C and N." M W obtained possession of the property so devised to her, and died in the 17th year of her age, unmarried, and without having any issue, having by her will manumitted all her slaves. A, the widow of the testator, is now living, having in the life time of M W married one R B. *Negro Grace*, one of the slaves manumitted by M W, petitioned for her freedom against B, C and N—*Held*, that the limitation over in the will to A, during her widowhood, constituted a good executory devise, because it was to take effect on the contingency of M W dying without leaving issue at the time of her death, and that the petitioner is not entitled to her freedom.

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paid by my executor to my nephew *James Cummins*, or to his heirs, (if any,) and the balance thereof equally divided between my brother *Hopewell*, and sisters *Cassandra* and *Ann*," &c. The testator died on or about the 3d of April 1788, without having revoked, or in any manner changed his will. *Samuel Harrison*, the executor named in the will, renounced the same, and letters of administration were granted to *Drury*, one of the defendants. After the death of the testator, *Mary Ann Wood* his daughter and legatee, obtained possession of the negro slaves; and being so possessed of them and entitled to them, on the 9th of October 1800, duly made her last will and testament in writing, in which, among other things, is as follows: "My will and desire is, that all my negroes shall be free." The testatrix died on the 7th of January 1801, in the *seventeenth year of her age*, unmarried; and without having any issue of her body, and also without revoking or in any manner changing her will. After the death of *Zebedee Wood*, *Ann* his widow intermarried with one *Richard Brown*, before the death of *Mary Ann Wood*, and survived *Mary Ann Wood*, and is now in full life, and has received her thirds of the personal estate of *Zebedee Wood*. *Hopewell* and *Cassandra Wood*, the brother and sister of *Zebedee Wood*, and legatees named in his will, survived *Mary Ann Wood*, and are now alive, and *Ann*, the sister and legatee of *Zebedee*, died before *Mary Ann Wood*, leaving issue still living. The defendants have obtained possession of the petitioner, and have acquired and are invested with all the right, title and estate, that *Hopewell*, *Cassandra* and *Ann*, had in the petitioner, and are to be considered in the same light that *Hopewell*, *Cassandra* and *Ann* would, were they the defendants in this cause. On this statement, the county court gave judgment for the petitioner, and the defendants brought this appeal

The case was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J.

T. Buchanan, for the Appellant, stated that the question was upon the construction of the will of *Zebedee Wood*, whether *Mary Ann Wood* took an absolute estate under the devise to her in the will, or was it not an executory devise to *Ann*, the wife of the testator?

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To show that it was an executory devise, he cited 2 *Blk. Com* 173. 2 *Fearne's Ex. Dev* 1, 73. *Nichols vs Hooper*, 1 *P. Wms.* 199. *Target vs. Gaunt*, *Ibid.* 432. *Hughes vs. Sayer*, *Ibid* 534. *Pinbury vs. Elkin*, *Ibid* 564. *Forth vs Chapman*, *Ibid* 663. *Atkinson vs Hutchinson*, 3 *P. Wms.* 258. *Lampley vs. Blower*, 3 *Atk.* 396. *Keily vs Fowler*, 6 *Bro. P. C.* 309. *Goodtittle vs. Pegden*, 2 *T. R.* 720. *Wilkinson vs South*, 7 *T. R.* 551. *Roe vs. Jeffery*, *Ibid* 585. *Fearne's Ex. Dev.* 279, (376.) *Doe vs. Lyde*, 1 *T. R.* 598; & *Trafford vs Boehm*, 3 *Atk.* 449

Johnson, (Attorney General,) for the Appellee, contended that a devise over, after a failure of issue generally, without restrictive words, was not an executory devise; and that there was no executory devise in this case to *Ann*, the wife of the testator. He cited *Love vs Wyndham*, 1 *Lev.* 290. *Pearse vs Reeves*, *Pollex.* 29. *Earl of Stafford vs Buckley*, 2 *Ves.* 181. *Badger vs Lloyd*, 1 *Ld. Raym.* 523. *Beauclerk vs Dormer*, 2 *Atk.* 308, 312. *Saltern vs Saltern*, *Ibid* 376. *Sheffield vs Lord Orrery*, 3 *Atk.* 287. *Lanesborough vs Fox*, *Ca. temp. Talb.* 262. *Fearne*, 322, 325, 341, 159. 2 *Bac. Ab*, 76, 77. and *Davidge vs Chaney*, 4 *Har. & M'Hen.* 393.

Chase, Ch J. delivered the opinion of the court. The question to be decided by the court in this case, arises under the will of *Zebedee Wood*; what estate did *Ann Wood*, the widow of *Zebedee Wood*, take under the will?

It is a principle generally recognized by the courts of law and equity, and the court think well established, that where the limitation over is in fee, after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable. In this case the limitation over is to *Ann Wood*, during her widowhood, and at her death or marriage, to be sold, &c. It is stated that *Ann*, the widow, married during the life of *Mary Ann Wood*, the first devisee, and is now living.

In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail unless such intention is opposed by some rule of law. The only rule of law which is supposed to stand in the way in this case, is that which restrains the testator from limiting

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his estate in such manner as to create a perpetuity; and if that is no obstacle in this case, there is nothing to prevent the testator's intention from being effectuated.

The limitation over to *Ann*, during her widowhood, plainly evinces an intention in the testator that she should be benefited by the devise to her, which could not be the case if her interest could not vest until the unrestricted failure of issue of *Mary Ann*, during the widowhood of *Ann*—a mere possibility, and too remote to be in the contemplation of the testator.

The limitation over to *Ann*, during her widowhood, constitutes a good executory devise, because it was to take effect on the contingency of *Mary Ann* dying without leaving issue at the time of her death.

The only consequence which can result from *Ann's* marrying in the life-time of *Mary Ann*, is that the remainder over, after the death or marriage of *Ann*, did take effect immediately on the death of *Mary Ann*, and such event did not change or alter the quality or nature of the estate created by the first limitation over to *Ann*, nor did it defeat the remainder over.

The court are of opinion, that the judgment of the county court be reversed.

JUDGMENT REVERSED.

SHORTER vs. BOSWELL. DECEMBER.

In a petition for freedom, the following part of the deposition of a witness was held to be competent evidence—— 'and always understood she, (the ancestor of the petitioner) came from *R N*, but did not know it of his own knowledge, and heard that she went by the name of *P S*." As also this part of the deposition of another witness "That his mother, in her life-time, told him same to the family

APPEAL from *Charles* County Court. The appellant exhibited to that court her petition for freedom against the appellee.

1. At the trial the petitioner offered to read in evidence to the jury, the deposition of *Mary Lancaster*, taken by consent of the parties, on the 24th of August 1803; wherein, to the *first interrogatory* propounded to the witness, viz. "Did you know *Martha*, or *Patt*, who formerly belonged to captain *John Lancaster*, and from whom did he get *Patt*?" she answered, "that she knew *Patt*, and always

it was generally reported, and she always understood, that a woman named *P S* of *J L* from the family of *R N*."

A record book of *Charles* county court, containing the certificate and affidavit of a priest in 1702, that he had, in 1681, in *Saint Mary's* county, married a negro man named *L R*, to a white woman named *E S* both servants of *W R*, an affidavit of a person who was present at the marriage, proving the same, as also the issue by the marriage, and an entry from the parish register of the latter county, stating that the above were therein recorded in 1702, and the whole recorded in the above record book in 1703, the entry thereof in the record book, (there being proof of the loss of the originals and of the parish register) was offered in evidence, in a petition for freedom, by a person claiming as a descendant from *E S* to prove the existence of a free white woman named *E S*, in the family of *W R*, her marriage, and the issue by that marriage, and was *held* to be admissible evidence.

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understood she came from *Raphael Neale*, but did not know it of her own knowledge, and heard that she went by the name of *Patt Shorter*." The defendant objected to the words "and always understood that she came from *Raphael Neale*, but did not know it of her own knowledge, and heard that she went by the name of *Patt Shorter*," as not being competent evidence, and the county court sustained the objection, and refused to let that part of the deposition be read to the jury. The petitioner excepted.

2. The petitioner then offered and gave in evidence, by *Thomas Lancaster*, that his mother, *Mary Lancaster*, was dead. And also offered to prove by the same witness, "that his mother, in her life-time, told him that it was generally reported, and she always understood, that a woman named *Patt*, or *Martha*, came to the family of *John Lancaster* from the family of *Raphael Neale*, of *Saint-Mary's* county." But the defendant objected to it, as incompetent and inadmissible evidence; and the county court were of opinion that the same was not competent or admissible evidence, and refused to let it go to the jury. The petitioner excepted.

3. The petitioner then offered and gave in evidence, that she was the daughter of a woman named *Betty*, who was the daughter of a woman named *Sarah*, who was the daughter of a woman named *Betty*, who was the daughter of a woman named *Martha*, or *Patt*, who was held in servitude by *John Lancaster*, of *Charles* county, and that *Patt* was called *Patt Shorter*, and had two sisters, namely *Mary*, who belonged to *Edward Neale*, and *Jane*, who belonged to *Roswell Neale*, and that *Edward* and *Roswell Neale* were the sons of *Anthony Neale*, of *Saint Mary's* county, who died about the year 1723. The petitioner also gave in evidence, that *John Lancaster* married *Elizabeth*, the daughter of *Raphael Neale*, who was also the son of *Anthony Neale*, and that *Martha*, or *Patt*, was given to *John Lancaster* by *Raphael Neale*; that *John Lancaster* gave *Sarah*, above named, to *Henry Digges*, of *Charles* county, deceased, who intermarried with *Henrietta*, the daughter of *John Lancaster*; that *Digges* sold *Betty*, the daughter of *Sarah*, to the defendant, *Boswell*; and that the petitioner was born of *Betty*, after the sale of her mother to the defendant. The petitioner then produced one of the record books of *Charles* county court, and offered to read in evi-

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dence an entry made in the said record, in folios 225 and 226, to prove the existence of a free white woman named *Elizabeth Shorter*, in the family of a certain *William Roswell*, of *Saint-Mary's* county, and that she married a black man named *Little Robin*, the servant of *Roswell*, and had by him three daughters, namely *Mary*, *Jane* and *Martha*, and that *Elizabeth Shorter*, and her husband, were given by *Roswell* to *Anthony Neale*, and that *Neale* married the daughter of *Roswell*. The entry was as follows:

"At the request of Mr. *Anthony Neale*, the following certificate and deposition were recorded: *Maryland*, ss. *Saint-Mary's* county. These are to certify, that in the year 1681, or near about that time, I *Nicholas Geulick*, Priest, the subscriber hereof, did join together in the holy estate of matrimony, according to the then law, a negro man named, to the best of my remembrance, *Little Robin*, to a white woman, whose name was *Elizabeth Shorter*, which couple all that time were both servants unto Mr. *William Roswell*, deceased, and was after, as I am informed, disposed of by the said *Roswell* unto Mr. *Anthony Neale* of *Charles* county. Certified under my hand, this 15th day of *June*, *Anno* 1702.

"*Nicholas Geulick.*"

"Memorandum. The day and year above, came before me, Mr. *Geulick*, and made oath upon the Holy Evangelist, that the above affidavit is the whole truth and nothing but the truth.

"*Jurat coram me,*

"*Joshua Guibert.*"

"*Maryland*, ss. *St. Mary's* county. *Emma Roswell*, widow, aged seventy years, or thereabouts, being sworn upon the Holy Evangelist, declareth upon her oath, that she the said deponent was present at the marriage of the abovesaid couple, and that the ceremony was performed by the abovesaid Mr. *Nicholas Geulick*, Priest, and that the negro man's name was *Little Robin*, and the white woman's name *Elizabeth Shorter;* and that they were, at the time of their being married, both servants unto this deponent's husband, *William Roswell*, deceased, and by him given and made over and delivered up unto *Anthony Neale*, upon marriage of the said *Neale* with *Elizabeth*, the daughter of said *Roswell*, and have remained

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Shorter vs Roswell

in the said *Neale's* service ever since; and that after the marriage of the said negro man and white woman, the said white woman had three mulatto girl children, named *Mary*, *Jane* and *Martha*, who are now living to the best of this deponent's knowledge.

"This 15th day of *June Anno* 1702. *Jurat coram me.*

"*Joshua Guibert.*"

Maryland, *St. Mary's* county, ss. (*King* and *Queen* parish,) *June* 6, 1702. Then recorded upon the record book of the abovesaid parish, the two within affidavits, one of Mr. *Nicholas Guelick*, Priest, the other of Mrs. *Emma Roswell.* This being a true copy as now given under my hand the day and date above, by me,

"*Wm. Hawett*, Clk. Vestry."

"Entered on the records of *Charles* county, *June* the 25th, 1703." [See 3 *Harr. & M'Hen.* 239.]

The petitioner further gave evidence, that the paper in the record mentioned to be recorded, was not to be found among the papers remaining in the clerk's office of the county; and that the parish registers of *King* and *Queen* parish, in *Saint-Mary's* county, prior to the year 1744, have been lost or destroyed. The defendant objected to the admissibility of the entry on the record, as evidence; and the county court sustained the objection. The petitioner excepted. There was a verdict and judgment for the defendant; and the petitioner appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J. by

T. Buchanan, for the Appellant; and by
Chapman, for the Appellee.

THE COURT dissented from the opinions expressed by the court below, in all of the *bills of exceptions.*

JUDGMENT REVERSED, AND PROCEDENDO AWARDED. *(a.)*

(a) In the case of *Mima Queen, and Child, vs. Hepburn*, 7 *Cranch*, 290, the Supreme Court of the *United States* decided, that *hearsay* evidence is incompetent to establish any specific fact, which is in its nature susceptible of being proved by witnesses who speak from their own knowledge; and that claims to freedom in *Maryland* are not exempt from that general rule.

SHEELY vs. BIGGS.

1808 DECEMBER.

Sheely vs Biggs

In an action of *slander*, the words charged to have been spoken were, that "he the said J *swore false*, and *swore to a lie*"—*innuendo*, "meaning that the said J. had committed perjury; that the said J. had taken a false oath before a magistrate"—*held* not to be actionable.

No words are actionable unless they impute a crime to the plaintiff which subjects him to punishment.

The office of the *innuendo* is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the *innuendo* to make them actionable.

If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable.

To make the word *forsworn*, slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding, in which the party was sworn.

APPEAL from *Frederick* County Court. It was an action of *Slander*, and the declaration stated, that the plaintiff, (now the appellee,) was a good, true, honest, and faithful citizen, and had always lived free and wholly unsuspected of and from all manner of perjury, &c. yet the defendant, (the appellant,) maliciously intending to injure the plaintiff in his good name, and to bring him into public scandal, ignominy and disgrace, and to subject him to the pains and penalties, by the laws and statutes of this state, made and provided against those who are guilty of false swearing, on, &c. spoke and published of and concerning the plaintiff these false, scandalous, and malicious words, viz. "He (meaning the plaintiff,) swore false, and swore to a lie," (meaning that the plaintiff had committed perjury, that he had taken a false oath before a magistrate.) The *second count* charged the defendant with uttering these words, to other citizens, of the plaintiff: "He (meaning the plaintiff,) had swore false, and would, if he did not take care, lose his ears for it," (meaning that the plaintiff committed perjury before a magistrate.) The general issue was pleaded, and the plaintiff obtained a general verdict for £22 17 6 current money. The defendant moved in arrest of judgment, and assigned the following reasons: 1. Because the words charged in the first count of the declaration are not actionable. 2. Because the words charged in the second count are not actionable. 3. Because the words charged in the different counts of the declaration, and alleged to have been spoken by the defendant, are not so laid and set forth in the said counts, as to entitle the plaintiff to maintain his action. 4. Because there is no *colloquium* set forth in the declaration, showing the words were spoken in reference to a judicial proceeding, or to what the words spoken referred. The county court overruled the motion, and rendered judgment on the verdict for the plaintiff. From that judgment this appeal was brought.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and GANTT, J.

Taney and *F. S. Key*, for the Appellant, cited *Holt vs. Scholefield*, 6 *T. R.* 691.

Shaaff, contra, cited 6 *Bac. Abr.* tit. *Slander*, (B. 3.) and *Gruneth vs. Derry*, 3 *Lev.* 166.

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Shealy vs Biggs

CHASE, Ch J. delivered the opinion of the court. There are some principles well established in actions of slander, which govern the court in determining this case.

First. No words are actionable unless they impute a crime to the plaintiff, which subjects him to punishment. 3 *Blk. Com.* 123. *Holt vs. Scholefield*, 6 *T. R.* 691, 694.

Secondly. The office of the *innuendo* is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; and if the words in themselves are not actionable, their meaning cannot be extended by it to make them actionable. *Holt vs. Scholefield*, 6 *T. R.* 694.

Thirdly. If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable.

The word *forsworn*, although in one sense it may import perjury, yet it does not *necessarily imply it;* for a person may be forsworn without committing perjury; and no extrinsic aid can be derived from the *innuendo* to give the words a criminal meaning.

If the words before the *innuendo* do not import slander, no words produced by the *innuendo* will make the action maintainable. It is not the nature of an *innuendo* to beget an action. Forsworn, by itself, does not import slander; otherwise of the word *perjured. Core vs. Morton*, *Yelv.* 27. *Holt vs. Scholefield*, 6 *T. R.* 694.

To make the word *forsworn* slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding in which he was sworn. *Core vs. Morton*, *Yelv.* 27.

The words in the declaration charged to have been spoken are, that "he, the said *Jacob*, *swore false*, and *swore to a lie.*" The subsequent words, "meaning that the said *Jacob* had committed perjury, that the said *Jacob* had taken a false oath before a magistrate," are part of, and come under the *innuendo.*

The question is, whether these words are actionable? and it is admitted, if they are not, the judgment must be arrested, there being one defective count in the declaration —a general verdict and entire damages having been given.

The court are of opinion they are not; and that the judgment of the county court be reversed, and judgment on the verdict be arrested.

JUDGMENT REVERSED, &c.

WEEMS vs. STALLINGS.

1808
DECEMBER.

WEEMS vs. STALLINGS

In an action of *trover* brought by an employer against his overseer, to recover the value of a hhd. of tobacco made on the plantation of the plaintiff, and inspected in the name of the employer, and the note delivered to the overseer, to be by him delivered to his employer, but which was retained and sold by the overseer as his share of the crop of six hhds. under an agreement entered into between the parties, stipulating that the overseer should have one-sixth part of all tobacco made—*held*, that the plaintiff was entitled to recover

APPEAL from *Calvert* County Court. This was an action of *trover*, brought by the appellant against the appellee, for one hogshead of crop tobacco, weighing 988lbs. &c. to which the general issue was pleaded. At the trial, the plaintiff offered in evidence, that in the year 1802, the defendant carried to the inspection house at *Lower Marlborough* six hogsheads of tobacco, which grew on the farm of the plaintiff during the year 1802, while the defendant acted as the overseer of the plaintiff; three of which hogsheads were crop tobacco, one weighing, &c. three second, one weighing, &c. That the tobacco was inspected in the name of the plaintiff, and the notes delivered to the defendant, to be delivered by him to the plaintiff, but that the defendant delivered only five, and retained the one of the crop hogsheads weighing 988, and which he afterwards sold. The defendant then produced and read in evidence, an agreement in writing entered into between him and the plaintiff, the execution of which was admitted, dated the 9th of September 1801, in which, among other things, it was agreed that the defendant was to serve the plaintiff as an overseer for the ensuing year, 1802, and to receive therefor the sixth part of all tobacco, &c. made by him on the plaintiff's plantation, with the hands, &c. stated to be found and furnished by the plaintiff. The defendant proved that the six hogsheads of tobacco, above mentioned, were made on the plantation of the plaintiff, while the defendant acted as overseer under the above articles of agreement. He then prayed the opinion of the court, and their direction to the jury, that if they should be of opinion, that the hogshead of tobacco sold by the defendant was part of the crop made on the plantation of the plaintiff during the year that the defendant acted as overseer under the above agreement, that the plaintiff is not entitled to recover in the present form of action. And the court, (*Gantt*, Ch. J.) upon this prayer, instructed the jury, that if they should believe, from the evidence, that the tobacco was made upon the plantation of the plaintiff, during the year mentioned in the agreement, when the defendant was overseer, and that there had been no division of the tobacco so made, that the defendant had an undivided property in the tobacco so inspected by virtue of the agreement, and

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Chapman vs. Brawner

that the plaintiff could not recover in this action. The plaintiff excepted; and the verdict and judgment being against him, he brought this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J. by

Johnson, (Attorney-General,) and *Magruder*, for the Appellant; and by

G. A. Clagett, for the Appellee.

THE COURT was of opinion that the defendant below was only a hired person; that that character was not changed by his compensation being uncertain and depending on the amount of the profits; that he had no such interest in the crop as would justify him in disposing of it, and that having sold the tobacco in question, he was liable to the plaintiff below in this form of action.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

In an action of trespass *q. c. f.* on a tract of land called *G. D.* the defendant took defence for a tract of land called *A.* on a part of which the alleged trespass was committed—*Held*, that the plaintiff was only entitled to recover for a trespass committed within the lines of the tract called *G. D.* as the same was located by him on the plots in the cause, such he had been in the possession and cultivation of the land on which the trespass was alleged to be committed, claiming the same as part of *G. D.* for upwards of 30 years, and it had always been called and reputed a part of that tract.

G. & J. CHAPMAN vs. BRAWNER.

APPEAL from *Charles* county court. An action of *trespass quare clausum fregit*, was brought by the appellants against the appellee, for entering their close called *Gryme's Ditch*, &c. The pleas of *non cul.* and *freehold* in the defendant, as part of a close called *Aventure*, were pleaded. Issue was joined to the first plea, and a general replication put in to the second. The defendant *demurred* to the replication, to which there was a joinder in demurrer. The county court *overruled* the demurrer, and directed the defendant to answer over to the replication. A general rejoinder was pleaded, and issue joined. The lands were located on plots returned under a warrant of resurvey, issued for that purpose. At the trial the plaintiffs gave in evidence, that fifty-two years ago the fence, located on the plots, was set up by the proprietor of the land, located on the plots, and called *The Adventure*, and that the fence has been uniformly kept up. They further gave evidence, that between 50 and 60 years ago their father, *Person Chapman*, had possession of the tract of land located on the plots called *Gryme's Ditch*, and also of all that part of the tract called *The Adventure*, which lies on the west side of the fence; that *P. Chapman*, in his life-time, cultivated and

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Smith & Buchanan vs Gorton

cut wood on the land on the west side of the fence, and had full and uninterrupted possession of the same, claiming it as his land; that on the death of *P. Chapman*, the land descended to the plaintiffs, who have since cultivated and cut wood on the same, and held possession thereof until the trespass mentioned in the declaration was committed; and that all that part of *The Adventure*, which lies on the west side of the fence, has been called and reputed as part of *Gryme's Ditch*, and has been held and occupied by the plaintiffs, and their father, as part of that land. The plaintiffs then offered to prove, that the defendant had committed the trespass, alleged in the declaration, to the eastward of the black line as located on the plots from letter *B* to letter *C*, the second line of *Gryme's Ditch*, as located on the plots by the plaintiff, and on the west side of the fence. But the defendant objected to the admissibility of the evidence, and contended that the plaintiffs were not competent to give evidence of any trespass committed on that land; and the county court, (*Gantt*, Ch. J.) was of opinion, and so directed the jury, that the plaintiffs were only entitled to recover for a trespass committed by the defendant within the lines of the tract called *Gryme's Ditch*, as the same is located on the plots by the plaintiffs. The plaintiffs excepted; and the verdict and judgment being against them, this appeal was brought.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J. by

T. Buchanan, for the Appellant; and by
C. Dorsey, for the Appellee.

JUDGMENT AFFIRMED.

SMITH & BUCHANAN VS. GORTON.

DECEMBER.

The court of appeals, having concurred in the opinion expressed by the county court in the *bill of exceptions*, but *reversed* the judgment *on the form of proceedings*, awarded a *procedendo*

APPEAL from *Baltimore* County Court. *Assumpsit* by the appellee against the appellants. The declaration contained two counts. The general issue was pleaded; and at the trial the plaintiff offered certain testimony in evidence. The defendants objected to the testimony being given to the jury in support of the issue joined on the second count in the declaration; but the county court,

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Mudd vs Reeves

(*H. Ridgely*, Ch. J.) overruled the objection, and permitted the evidence to be given to the jury. The defendants excepted; and the verdict and judgment being for the plaintiff, they appealed to this court.

The cause was argued before Chase, Ch. J. Buchanan, Nicholson, and Gantt, J. by

Harper and *Purviance*, for the Appellants; and by *Winder* and *Rogers*, for the Appellee.

The Court were of opinion that there was error in the form of proceedings, the second count in the declaration being defective; but they concurred in the opinion expressed by the court below in the bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

Mudd vs. Reeves

The amount expressed in a note, purporting to be a genuine *bank note*, but which was proved to be forged, may be recovered in an action of *assumpsit* by the holder of the note from the person of whom he received it, although at the time of its receipt, neither party knew it not to be genuine, and the defendant did not warrant it to be genuine, or endorse it.

Appeal from *Charles* County Court. An action of *assumpsit* was brought by the appellant against the appellee, and the declaration contained counts, for *money had and received*, for the *price of a gelding sold*, *a quantum meruit* for a gelding sold, for *money paid, laid out and expended*, and for *money lent and advanced*. The general issue was pleaded. At the trial the plaintiff gave in evidence, that sometime before the bringing the action, he agreed with the defendant to sell him a horse for the sum of $60, and that the defendant agreed to pay that sum for the horse; that the horse was to be delivered on the payment of the price agreed upon. That on the day after the agreement, the defendant sent to the plaintiff the paper produced, purporting to be a bank note of the Bank of *Baltimore* for $100. That the person by whom the note was sent delivered it to the plaintiff, who, before receiving it, asked the opinion of one *M'Pherson* whether the note was genuine or not, who was of opinion that the note was genuine. That the plaintiff delivered the horse, according to the defendant's request, to the person by whom the defendant had sent the note, and the plaintiff also, at the same time, according to the defendant's request, paid to the same person, for the defendant, $40, being the difference between the sum specified in the note, and the price of the horse. That the defendant received the $40.

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Keys & Heron vs Goldsborough

The plaintiff then gave in evidence, that the note was forged. There was no evidence that the defendant or plaintiff knew or suspected that the note was forged, nor was there any evidence that the defendant had endorsed the note, or had expressly warranted it to be genuine; but both plaintiff and defendant considered it genuine at the time. The defendant then prayed the court for their instruction to the jury, and the court, *(Key* and *Clarke*, A. J.*)* according to the defendant's prayer, were of opinion, and did instruct the jury, that if they should be of opinion, from the evidence, that the defendant, at the time he sent the note to the plaintiff, did not know that it was a forged note, or had not endorsed it to the plaintiff, or expressly warranted it to be a good note, that the plaintiff was not entitled to recover; and that the law, from the evidence offered, did not imply a warranty or contract on the part of the defendant to pay the sum specified in the note, to the plaintiff, although the note was forged, unless he knew that the note was forged when he delivered it to the plaintiff, or had endorsed the note, or expressly warranted it to be a genuine one. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff brought this appeal.

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J. by

T. Buchanan, and *Chapman*, for the Appellant; and by *C. Dorsey*, and *Baker*, for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

KEYS & HERON vs. GOLDSBOROUGH'S Lessee. JUNE (E. S.)

APPEAL from *Dorchester* County Court. This was an action of *ejectment* brought by the present appellee, (the plaintiff in the court below,) to recover possession of a tract of land called *Ennalls's Inheritance*. The defen-

A P, by his will, devised to C C & A M, all his real estate, to be sold by them for the payment of his debts. Evidence of a sale made at auction by them to W G, of a part of the real estate, together with a memorandum of the sale, subscribed by the auctioneer, and a receipt given by them for the purchase money—*Held* to be admissible evidence to show a title at law in W G, without a deed of bargain and sale, or other conveyance, to him from the trustees, and to be sufficient to enable his lessee to recover such real estate in an action of ejectment.

R H, by his will, devised as follows: "I give and bequeath unto my dearly beloved son, C H, the free use of my land called" &c. "with all the houses" &c. *during his natural life, to occupy and enjoy the same; and after the decease of my said son C H*, I give and bequeath the said land called," &c. "with all the houses," &c. "*unto the heirs of my son C H, lawfully begotten of his body, for ever*; and for want of such heirs, I give, &c.—*Held* by the county court that under this devise, C H took an estate in tail general.

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dants, (now appellants,) appeared and took general defence.

1. At the trial the plaintiff proved that *Archibald Pattison*, on the 9th of August 1791, being seized of the land for which the action was brought, and of other lands, duly made his will, in which he stated, that he meant and intended to dispose of all his estate, real and personal, and to charge all his real estate with the payment of his just debts. He then devised to his friends, *Charles Crookshanks* and *Archibald Moncreiff*, and the survivor of them, all his real and personal estate, to be sold and disposed of by them, in as full and ample manner as he himself could dispose of them, for the payment of his debts, leaving the manner of such disposition entirely to their own judgment and discretion; but it was his request and direction to them, that his lands on *Transquakin* river, bought of captain *Ennalls*, and those bought of *Stewart*, should if possible be reserved, together with those taken up by him, which adjoined those purchased of *Stewart*, but more particularly the dwelling plantation where col. *Bartholomew Ennalls* resided, which he directed should be last sold of any of his real estate, and if possible reserved for his daughter. And, after the payment of his debts, he gave and bequeathed to his dear daughter, *Mary Pattison*, and the heirs of her body, all his estate real and personal, &c. He appointed *Crookshanks* and *Moncreiff*, executors of his will, and trustees for the sale of his real and personal estate, and directed that the said powers should be fully delegated to the survivor in case of the death of either, and that such survivor might delegate the same to his executor, if not before fully executed. The plaintiff also proved that *Pattison* died seized of the land in dispute, and that after his death, *Crookshanks* and *Moncreiff*, on the 3d of December 1791, caused the will to be duly proved, and on the same day renounced their right to the executorship. The plaintiff also proved that *Crookshanks* and *Moncreiff* took upon themselves the execution of the trusts mentioned in the will, and of the powers and authority therein contained and limited, and that afterwards, on the 15th of October 1792, they exposed the tract of land called *Ennalls's Inheritance*, and also other lands, to sale at public auction, for the purpose of discharging the debts of *Pattison*, and in pursuance of the trusts, and that the lessor of the plaintiff became the highest bidder and purchaser thereof, and

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the lands were sold and struck off to him by the trustees. The plaintiff also gave in evidence the auctioneer's bill or memorandum of the sale, subscribed by him, which subscription, he being dead, was duly proved; and also the exemplification of a judgment recovered by *Moncreiff*, as the surviving trustee, against the lessor of the plaintiff, for the purchase money arising from the said sale; and also a receipt given by *Moncreiff* to the lessor of the plaintiff, for the payment of the money so recovered, under the hand and seal of *Moncreiff*, duly proved, which payment was made before the commencement of this ejectment. The defendants objected to this evidence, and contended that it was inadmissible and incompetent to show a title at law in the lessor of the plaintiff to the land claimed in this ejectment; and moved the court to direct the jury, that unless the plaintiff should produce and show a deed of bargain and sale, or other conveyance, duly executed, acknowledged and enrolled, according to law, in the usual forms of law, to the lessor of the plaintiff, for the land so sold, the plaintiff was not entitled to recover. But the court, [*Polk*, Ch. J. and *Robins*, A. J.] were of opinion, and determined that the evidence was admissible and competent to show a title at law in the lessor of the plaintiff, without a deed of bargain and sale, or other conveyance, and directed the jury, that if they believed the evidence, the same was sufficient to enable the plaintiff to recover. The defendants excepted.

2. The plaintiff then proved that *Robert Heron*, on the 29th of June 1788, being seized of the tract of land called *Ennalls's Inheritance*, mentioned in the declaration, duly made his will, and thereby, as to such worldly estate as it had pleased God to bless him with, he devised as follows: "It is my will, and I do order, that in the first place all my just debts and funeral expenses be paid and satisfied. *Item*, I give and bequeath unto *Elizabeth*, my dearly beloved wife, during her widowhood, the use of all my estate real and personal," &c. "When it shall please God to take to himself my dear and loving wife, then my will and desire is, that my estate, both real and personal, be given and bequeathed in manner following: *Item*, I give and bequeath unto my dearly beloved son *Cuthbert Heron*, the free use of my land whereon I now live, called *Ennalls's Inheritance*, being by estimation about 300 acres, with all

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the houses and improvements thereon, during *his natural life*, to occupy and enjoy the same; and after the decease of my said son *Cuthbert Heron*, I give and bequeath the aforesaid lands called *Ennalls's Inheritance*, with all the houses and improvements thereon, *unto the heirs of my said son Cuthbert Heron, lawfully begotten of his body, for ever:* and for want of such heirs, I give and bequeath the aforesaid lands called *Ennalls's Inheritance*, with the improvements thereon, unto my dearly beloved son *Robert Heron*, and the heirs of his body lawfully begotten, for ever; and for want of such issue, to my dearly beloved son *Charles Heron*, and the heirs of his body lawfully begotten, for ever, and for want of such issue, to my four daughters, to be equally divided amongst them, and the heirs of their bodies lawfully begotten, for ever. *Item*, I give and bequeath to my beloved son *Robert Heron*, a tract of land called *Heron's First Addition*, 267 acres, unto him the said *Robert Heron*, and the heirs of his body lawfully begotten, for ever." There was a similar devise of *Heron's Second Addition* to his son *Charles*. The plaintiff further proved, that being so seized, the said last named testator afterwards died, leaving the lands and tenements in his will mentioned, and the several children therein also mentioned. That *Elizabeth Heron*, the widow of the testator, survived him, and entered into the premises devised to her, and held the same during her widowhood, which ended with her life in the month of December 1803, when she died. That *Cuthbert Heron*, the devisee in the will mentioned, also survived the testator, and on the 21st of May 1784, being of lawful age, by deed of indenture duly executed, acknowledged and recorded, he granted, bargained and sold, *Ennalls's Inheritance*, with other land, with the appurtenances, to *Archibald Pattison*, and his heirs, in fee simple, under whom the lessor of the plaintiff claims. That *Cuthbert Heron* afterwards, in the year 1790, died, leaving lawful issue, *Cuthbert Heron*, one of the defendants, his eldest son and heir at law. The defendants objected to the title claimed by the plaintiff, and contended that *Cuthbert Heron*, under the will of *Robert Heron*, took only an estate for life in the lands devised to him, and had no lawful power to make a conveyance of the said lands beyond his natural life. But the court, [*Robins*, A. J.] was of opinion, and decided, that *Cuthbert Heron*,

took an estate intail general in the lands devised to him by *Robert Heron*, and therefore had lawful power, according to the laws of this state, to make the conveyance of the 21st May 1784, and directed the jury accordingly. The defendants excepted. Verdict and judgment for the plaintiff, and the defendants appealed to this court.

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Leeke vs Beanes

The cause was argued before CHASE, Ch. J. BUCHANAN, and NICHOLSON, J. by

Hammond, *Campbell*, *Carmichael*, and *Kerr*, for the Appellants; and by

Martin, *Bullitt*, *J. Bayly*, and *W. B. Martin*, for the Appellee.

THE COURT concurred with the court below in the opinion given as stated in the *first* bill of exceptions; but as to that expressed in the *second* they gave no opinion, in consequence of the parties wishing to effect a compromise.

JUDGMENT AFFIRMED.

LEEKE'S Adm'r. *D. B. N.* vs. BEANES.

JUNE.

The not returning an inventory on the estate of an intestate by his administrator, is not sufficient evidence to charge the administrator with a debt of the intestate

ERROR to the General Court. Debt on a bond for the payment of money, dated in 1797, executed by the intestate of the appellant to the appellee. *Payment* and *plene administravit* were pleaded, to which there were the general replications, and issues joined. The facts were these: The bond, on which the suit was brought, was executed by *Frank Leeke*, the obligor, who died intestate, and *S. Leeke* took out letters of administration on his estate, and gave bond as the law required, for its due administration. *S. Leeke* died intestate, without having returned an inventory on the estate of *F. Leeke*. *S. Hepburn*, the defendant, (now appellant,) after the death of *S. Leeke*, took out letters of administration *de bonis non* on the estate of *F. Leeke*, and gave bond for the due administration of the estate of *F. Leeke*, unadministered by *S. Leeke*. *Hepburn* did not return an inventory on the estate of *F. Leeke* within twelve months from taking out the letters *de bonis non*, nor had he done so at the time of bringing this suit. The question submitted on these facts to the court was, whe-

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Gantt vs Bowie

ther they were sufficient to charge the defendant below with the debt for which the suit was instituted? The general court, at October term, 1804, were of opinion they were sufficient, and gave judgment for the plaintiff. The defendant brought the present writ of error.

The cause was argued in this court before Polk, Buchanan, Nicholson and Earle, J.

Magruder, for the Plaintiff in error, cited *Morgan vs. Slade, et ux. (ante* 88.) *Wilson's ex'r. vs. Slade, et ux. (ante* 281); and *Peake's Evid.* 345, 346.

Shaaff, for the Defendant in error, cited *Swinb.* 420; and the act of 1798, *ch.* 101.

JUDGMENT REVERSED.

June

Gantt vs. Bowie's Adm'r.

Same vs. Same.

The defendant, as surety for F B, in a bond for the payment of money given to the plaintiff as trustee for the sale of an estate, having pleaded payment, at the trial offered to file an account in bar, claiming in the name of F B, a sum of money due to him as his proportion of the amount of the sales of the said estate—*Held*, that the account could not be filed.

To establish the above account in bar, the defendant offered to read a copy, under seal, of a decree of the court of chancery, for the sale of the estate of J B, and the appointment of the plaintiff trustee to make the sale, and the trustee's report of the sale and ratification by the chancellor, together with the auditor's statement and ratification thereof, showing the proportion due to the creditors, and among others of the sum due to F B above named, and claimed to be set off—*Held*, that such evidence was inadmissible.

The account to shew that F B was not entitled to the proportion adjudged to him out of the proceeds of the sale of the real estate of J B, and to prove that F B was one of the sureties in the administration on the personal estate of J B, and that it had been misapplied, and not legally administered, offered in evidence the administration bond, and an account signed by F B, for the administration—*Held*, that the evidence was not admissible.

Appeals from *Prince-George's* County Court. They were two actions of *debt* on joint and several bonds, given to the appellant, as trustee appointed by the court of chancery for the sale of the real estate of *J. Eversfield*, each by *F. Bowie*, with the appellee's intestate, and *J. Brown*, his sureties; each bond was conditioned for the payment of £19 5 0. The defendant, (now appellee,) in each case pleaded *payment* by his intestate, to which there was the general replication, and issue joined.

1. At the trial of the *first* cause at *September* term 1801, after the jury were sworn, the defendant produced and offered to file the following account in bar. "*Thomas Gantt*, trustee for the creditors of *John Eversfield*, to *Fielder Bowie*, Dr.

1793. To the sum adjudged to be due me by the chancellor as my proportion of the amount of the sales of *John Eversfield's* real estate, £67 3 3¼"

To which the plaintiff objected. But the county court overruled the objection, and permitted the account to be filed, and the same was filed. The plaintiff excepted.

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2. At the trial of the *second* cause at *April* term 1802, it having been agreed between the parties that the plea of *discount* might be pleaded and made up in a regular manner, and that any thing might be given in evidence, which could legally be given in evidence under that plea, the plaintiff offered in evidence, that the bond on which this suit was brought was given by *F. Bowie*, as the principal obligor, and *A. Bowie*, deceased, and *J. Brown*, his sureties, to the plaintiff, as trustee for the sale of *J. Eversfield's* real estate, and that the money claimed to be due thereon is not claimed by the plaintiff in his individual capacity, but as trustee as aforesaid. To establish the plea of discount in this cause, and to have the account in bar mentioned therein discounted out of the bond on which this suit is brought, the defendant offered in evidence a copy, under seal, of the decree made in the court of chancery in the case of the creditors of *John Eversfield*, deceased, against *Mary*, his only daughter and heir, decreeing that the real estate of the said *Eversfield*, which descended to his daughter *Mary*, be sold for the payment of the debts of her father, and that *T. Gantt*, (the plaintiff,) be appointed trustee to sell the said real estate; that he should divide the purchase money into six or more equal parts, and take a separate bond for each part, in order that the same might be assigned amongst the creditors in case they should so elect, and it should appear to the court proper to be so done. That he should bring into court the money arising from the sale, to be applied in satisfying just claims against the deceased. Also a copy, under seal, of the report made by the trustee of the sale of the said real estate, and the chancellor's order ratifying the same; and the auditor's statement of the proportions due to the creditors, and among others, to *F. Bowie*, of £28 12 1, and £18 18 1; to *F. Bowie*, & Co. £77 14 4; to *A. Bowie*, (the defendant's intestate,) £6 16 11, and to *Contees* and *Bowies* £15 17 10. Which statement was approved and ratified by the chancellor. The defendant also offered to prove, that *F. Bowie* mentioned therein, is the same *F. Bowie* mentioned in the bond on which this suit is brought. The plaintiff objected to the copy of the decree, &c. being read in evidence. But the court, [*Sprigg*, Ch. J.] overruled the objection, and permitted the same to be read, and it was read accordingly. The plaintiff excepted.

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S. The plaintiff to prove that *F. Bowie* was one of the sureties in the administration bond on the personal estate of *J. Eversfield*, and that the personal estate had been misapplied, and not legally administered, offered in evidence the administration bond, and an account signed by *F. Bowie*, for the administratrix, and intending to prove thereby that *F. Bowie* was not entitled to a proportion of the sales of the real estate of *J. Eversfield*, equal to the sums awarded to him. The defendant objected to the same being proved and read in evidence; and the county court, [*Sprigg*, Ch. J. and *Duckett*, A. J.] being divided in opinion, the same was not permitted to be proved or offered in evidence. The plaintiff excepted. Verdicts and judgments in both cases for the defendant, and the plaintiff prosecuted these appeals.

The causes were argued before Chase, Ch. J. Polk, Buchanan, Nicholson, and Earle, J. by

Magruder, for the Appellant; and by
T. Buchanan, for the Appellee.

The Court dissented from the opinions of the court below, given in the *first* and *second* bills of exceptions, as herein stated, and concurred with that court in the opinion given in the *third* bill of exceptions.

JUDGMENTS REVERSED, AND PROCEDENDOS AWARDED.

JUNE.

Barnes vs. Blackiston, *et al.*

B and J sold and delivered to H B a quantity of sugar, under a parol agreement with J R, that J R, would pay for the sugar if H B did not. J R and B and J for the sugar; and an action of *assumpsit* was brought in the names of B and J for the use of J R—*Held*, that it could not be sustained.

As a matter of practice, the evidence offered to the jury on which the opinion of the court is prayed, ought to be stated in the bill of exceptions. The court of appeals, however, will retain a bill of exceptions where the court below was called on and did give a direction to the jury, although no facts are stated therein.

Appeal from *Charles* County Court. This was an action of *assumpsit*, brought by the appellees, and entered for the use of *James Robertson*, against the appellant. The declaration contained a count for goods, wares and merchandizes, properly chargeable in account, as by a particular account, &c. a count for money paid, laid out and expended, and a count on a *quantum meruit* for goods, &c. property chargeable in account, sold and delivered. An account was filed with the declaration, in which the defendant was charged as debtor to the plaintiffs, on the 3d of December 1799, "to 1 hhd. sugar, p. bill p. Mr. *James*

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Robertson, on 90 days credit, $174 55." At the trial of the cause, the defendant moved the court to direct the jury, that if they find from the evidence that the plaintiffs sold and delivered to the defendant the sugar mentioned in the declaration, under a parol agreement with *James Robertson*, (for whose use the suit is endorsed on the record,) that he *Robertson* would pay for the sugar if the defendant did not, and that *Robertson* did pay the plaintiffs for the sugar, in virtue of his agreement, at the request of the plaintiffs, that then the action cannot be maintained in the names of the plaintiffs, for the use of *Robertson*, but that *Robertson* should have brought an action in his own name for money advanced, or laid out and expended, for the defendant. Which opinion and direction the county court, [*Sprigg*, Ch. J.] refused to give to the jury. The defendant excepted; and the verdict and judgment being for the plaintiffs, the defendant prosecuted this appeal.

The cause was argued before Chase, Ch. J. Buchanan, and Nicholson, J.

T. Buchanan, for the Appellant, contended, that the judgment of the court below must be reversed. That it was too plain a case to require an argument.

Shaaff, for the Appellees. The claim is a proper one against the appellant, yet the action may have been misconceived. This court can only look at the declaration and the bill of exceptions. The court below were right in refusing to give the opinion prayed for, if there was no evidence in the case. There are no facts stated in the bill of exceptions, but a hypothetical opinion prayed to be given by the court, which the court very properly refused to give. No evidence was offered that the money was paid by *Robertson*, or any agreement that he would pay it, if the defendant did not; and this court cannot say that the court below erred in refusing to give an opinion where no facts were proved to justify such opinion being given. It is not stated that the defendant offered to prove the fact of payment by *Robertson*, nor that the plaintiffs had been paid. If the judgment is reversed, this court will say that the opinion ought to have been given by the court below, although founded on no facts. It cannot be inferred

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by this court judicially, that there was any evidence offered at all. This court cannot travel out of the record. It is important that facts should be stated; and this court cannot reverse this judgment, as there was no statement of facts upon which the opinion and direction, as prayed, could be given.

T. Buchanan, in reply. Hypothetical opinions have been often given in the late general court, and courts do so when they do not require the whole facts spread upon the record. It is done to prevent the drawing up the facts, and crowding the record, and to save expense to the parties. Such was the practice in the cases of *Lawrence vs. Devalt*, (*October* term 1794.) *Mahony vs. Ashton*, 4 *Harr. & M'Hen.* 296, 305. *Newman vs. Morris*, 4 *Harr. & M'Hen.* 421. *Queen vs. Ashton*, 3 *Harr. & M'Hen.* 339. *Worthington vs. Filthy*, (*October* term 1791;) and *Reeves vs. Middleton*, (*May* term 1793.) Will it be said, that because no facts are stated, this court will not review the decision of the court below? It may be inferred that the evidence was offered, or the court below would not have been called on to give the opinion and direction as prayed.

Chase, Ch. J. In every case where the court are called upon to give a direction to the jury, the facts should appear, and the opinion of the court will depend upon the nature of the evidence, and unless it does appear what the facts are, it cannot be said the court erred in their opinion by refusing to give the opinion asked for. If a contrary practice prevailed, the court might be called upon to decide upon questions not arising in the case. I am of opinion, that the bill of exceptions in this case ought not to be retained by this court.

Buchanan, J. As the court below has not stated that they refused the prayer, because the facts were not stated or proved, this court are bound to decide on the law in the case. The most regular way would be to state the facts, or that there were no such facts, if none existed in the case. If in this case there had been no facts to justify the opinion being given, the plaintiffs should not have stated in the bill of exceptions that the facts did not exist. As a matter of practice, the evidence should be stated. It is

my opinion, that the bill of exceptions taken in the case ought to be retained. 1809. Louderman vs Wilso

NICHOLSON, J. concurred with BUCHANAN, J.

JUDGMENT REVERSED.

LOUDERMAN, Garnishee of HARRISON vs. WILSON. JUNE

A sum of money due & owing, and which by express agreement was to be paid in work and labour, is a credit, which may be attached in virtue of the attachment laws of 1715, *ch.* 40, & 1795, *ch.* 56.

ERROR to the General Court. Attachment on warrant; and the case was, that at the time of issuing the attachment from the county court, *Harrison*, the original defendant, owed *Wilson*, the plaintiff, (now appellee) the amount of the account exhibited; *Louderman*, the garnishee, was indebted to *Harrison* in the sum of $35, which sum, by express agreement, was to be paid and satisfied in work and labour by the garnishee for *Harrison*, when requested. No demand was ever made upon the garnishee to do the work, but he was always ready to do it. The county court decided, that it was not a credit in the hands of the garnishee which could be attached in virtue of the acts of 1715, *ch.* 40, and 1795, *ch.* 56; and judgment being rendered for the defendant in the county court, the plaintiff appealed to the general court, where the judgment of the county court was *reversed* at May term 1804, and a *procedendo* awarded. The appellee brought a writ of error to this court.

The cause was argued before POLK, BUCHANAN, NICHOLSON, and EARLE, J. by

Kell, for the Plaintiff in error, and by
Gwynn, for the Defendant in error.

JUDGMENT OF REVERSAL AFFIRMED.

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HALL vs. GITTINGS's Lessee.

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If the possession of land has gone agreeably to an ancient deed, which needed no enrolment, the *inspeximus* of the deed may be read in evidence, and is effectual to pass the land

Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence if the whole tract is united in the same person, and the whole has been located

A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her having been declared defective, was admitted to give evidence on the part of the defendant in an action of ejectment brought for the same land by a person claiming under her deed. *(Note)*

If a grantor of land, residing in a particular county, and having a temporary residence in another county, in neither of which counties does the land lie, acknowledges the deed in the county in which his temporary residence is, such deed is not good and valid in law to pass and transfer the grantor's interest in the land

A temporary residency in any county of the state is not sufficient to enable a grantor, being a citizen of the state, to acknowledge a deed, during such temporary residence, for land lying in any other county of the state.

The words "*legally authorized and assigned*," in a certificate of the clerk of a county court to a deed acknowledged before two justices of the peace of that county, is a substantial compliance with the directions, and within the meaning of the act of *November* 1766, *ch.* 14, and are words of the same import as "*duly commissioned and sworn*"

Where the defendant in an action of ejectment, was in possession of 100 acres of land, by enclosures and cultivation, for 15 years, and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged, by enclosures for 15 years thereafter, claiming the same as his own—*Held*, that he had title to the 100 acres by adversary possession.

Where the expressions used in a grant of land describe it as "lying on the ridge of Gunpowder river, beginning at a bounded oak, being the westermost bounds of a tract of land laid out for M S, and running west 500 ps. to a bounded oak *standing by the Great Falls*, and running N from the said oak," &c.—*Held*, that they do not operate to bind the first line to terminate at the Great Falls, although no evidence be given of the tree or place where it stood.

The declarations by a deceased person, then seized of a portion or tract of land not located on the plots in the cause, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant.—*Held*, that the declarations were not admissible in evidence.

In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, part of a tract of land called *H F*, the jury, by their verdict, found the true location of that tract, and also the locations of other tracts of land for which the defendant took defence. They also found for the plaintiff all the land called *H F*, as located by them, which lies clear of the other tracts, so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and *J S*, from a particular point to another—*Held*, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action.

Error to the General Court. In this case there was a *procedendo* from the late court of appeals, directing a new trial of an action of *ejectment*, (which had been tried in the general court at *May* term 1800,) for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, being part of a tract of land called *Hill's Forest*, situate in *Baltimore* county. (See 1 *Harr. & Johns.* 14.) The defendant took defence for *Cullen's Lot*, and *Cullen's Addition*, on the plots made and returned. Judgment was entered against the *casual ejector* for all the lands undefended.

1. The plaintiff at the new trial at May term 1805, produced in evidence a certificate of survey of a tract of land called *Hill's Forest*, made for *Richard Hill* on the 4th of October 1683–4, in pursuance of a warrant granted him for 1000 acres, on the 31st of July 1683, "lying in *Baltimore* county, in the woods above the head of a river called *Gunpowder* river, and upon the S side of the N branch of the said river, beginning at a bounded red oak standing at the end of the N line of a parcel of land formerly taken up for *James Thompson* (*a*), and running from thence W parallel with the said land for the length of 320 perches, then running from the end of the W line N 310 perches, then running from the end of the N line, E 320 perches, until it intersects the land called *Clarkson's Hope*, then running

(*a*) Called "*Thompson's Choice*"

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with the said land, and a parcel of land called *Gassaway's Ridge*, by a straight line to the first bounded tree, containing and laid out for 1000 acres of land more or less." Also a *patent* granted to *Richard Hill*, on the 10th of August 1684, for that land. Also the *will* of *Richard Hill*, dated the 20th of October 1700, whereby he devised to his sons *Richard*, *Joseph* and *Henry*, by a residuary devise in the will, the said land, equally to be divided, to them and their heirs, for ever. Also the will of *Joseph Hill*, dated the 21st of May 1724, whereby he devised the remainder of his estate, both real and personal, including the said tract of land, to his brother *Henry Hill*, (son of the patentee,) and his heirs, for ever. Also the entries on the *Rent Roll*, showing that *Hill's Forest*, 1000 acres, was in possession of *Joseph Hill*, and stating therein an alienation of the land from *Henry Hill* to *Joseph Hill*, on the 27th of July 1737. Also a copy of a deed from *Henry Hill*, son of the patentee, to *Joseph Hill*, dated the 27th of July 1737, and the record book, with the deed therein recorded, in the following words: (*See it set forth in* 1 *Harr. & Johns.* 16.) Also the will of *Joseph Hill*, dated the 20th of October 1761, whereby he devised to his granddaughter, *Henry Margaret Hill*, all the remainder of his tract of land called *Hill's Forest*, not devised to *Nathaniel* and *Joseph Richardson*. He devised to *Joseph Richardson* 200 acres, to be laid off at the eastermost end of *Hill's Forest*, and to *Nathaniel Richardson* 200 acres, to be laid off at the westermost end of *Hill's Forest*, and the residue, 600 acres in the middle, he devised to his granddaughter *Henry Margaret Hill*, (now *Ogle*,) in fee. Also a deed from *Joseph Richardson* to *Charles Wells*, dated the 27th of March 1779, for 200 acres of land, part of the land called *Hill's Forest*. Also a deed from *Charles Wells* to *George Buchanan*, dated the 9th of October 1784, for the 200 acres of land, part of *Hill's Forest*. Also a deed from *George Buchanan* to *James Gittings*, the lessor of the plaintiff, dated the 28th of December 1789, for the last mentioned 200 acres of land. Also a deed from *Benjamin Ogle*, and *Henry Margaret* his wife, to *James Bosley*, dated the 25th of June 1777, for part of the tract called *Hill's Forest*, supposed to contain 480 acres. Also a deed from *James Bosley* to *George Buchanan*, dated the 16th of June 1784, for the last mentioned part of *Hill's Forest*. Also a deed

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from *George Buchanan* to *James Gittings*, the lessor of the plaintiff, dated the 28th of December 1789, for the last mentioned part of *Hill's Forest*. Also the proprietary *debt books* from 1754 to 1762, showing that *Joseph Hill* was charged with 1000 acres of *Hill's Forest*; also the debt books from 1762 to 1771, shewing that *Joseph Hill's* heirs were charged with the said land; and also the debt books in 1771, showing that *Joseph Richardson* was charged with 200 acres, *Nathaniel Richardson* with 200 acres, and *Henry M. Hill* with 600 acres of *Hill's Forest*. The defendant objected to the reading of the deed before mentioned, from *Henry Hill* to *Joseph Hill*, dated the 27th of July 1737.

Martin, (Attorney-General,) for the Plaintiff, cited *Bull. N. P.* 254. *Style*, 205, 445. 2 *Bac. Ab.* 308. *Kendall's* case, 3 *Lev.* 387, 888. *Medlicott vs. Joyner*, 1 *Mod.* 4. *Martin vs Monke*, 5 *Mod.* 211. Sir *Edward Seymour's* case, 10 *Mod.* 8 *Combs vs. Dowell*, 2 *Vern.* 591. *Stanyon vs. Davis*, 6 *Mod.* 225. *Taylor vs. Jones*, 1 *Ld. Raym.* 746. *Woodward vs. Aston*, 1 *Vent.* 296, 297. *Saltern vs. Melhuish*, *Ambl.* 247, 248 *Gilb. L. E.* 97, 98, 101. *Lofft's Gilb.* 102. 2 *Bac. Ab.* tit. *Evidence*, (F) 646. 3 *Com. Dig.* tit. *Evidence*, (B. 2;) and *Smartle vs. Williams*, 1 *Salk.* 280, 281.

Chase, Ch. J. The court were of opinion, in the former trial between these parties, that a *copy* of a deed which needs no enrolment is not evidence. But the present question is, whether the *inspeximus* of the enrolment of a deed, which requires no enrolment, is good evidence, it being accompanied with other circumstances, such as antiquity, and possession going with it.

The court are of opinion, that if possession is found to have gone agreeably to the deed, it being an ancient deed, the *inspeximus* of the deed, though it does not require recording, may be read in evidence, and the deed is good and effectual to pass the land. But if the jury do not find that possession has gone with the deed, then the *inspeximus* is not evidence, and the jury are to disregard the deed.

The court consider the distinction is well established.

2. The defendant objected to the reading in evidence the deed, herein before mentioned, from *Joseph Richardson* to *Charles Wells*, dated the 27th of March 1779, for 200 acres of land, part of *Hill's Forest*, as that deed was not located on the plots returned in the cause.

Martin, (Attorney-General,) for the Plaintiff, referred to *Hall's Lessee vs. Gough*, 1 *Harr. & Johns.* 119.

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CHASE, Ch. J. If the title to the 200 acres, and the 600 acres, are united in the same person, by laying down the whole, the 200 acres are sufficiently located. The court are of opinion, that the deed may be read in evidence to the jury, although it has not been particularly located on the plots.

5. *The first bill of exceptions.* The deed from *Benjamin Ogle*, and wife, to *James Bosley*, having been adjudged defective by the court of appeals, and the judgment in the former trial between the parties reversed, because of the opinion of this court as contained in the *second* bill of exceptions, and the court of appeals having expressed an opinion that the plaintiff might give evidence that Mr. *Ogle* resided in *Prince-George's* county at the time he executed the deed, if that was the case, and the plaintiff having produced, and read to the court and jury, the deed from *Benjamin Ogle* and *Henry Margaret* his wife, to *James Bosley*, dated the 25th of June 1777, stated to be "between *Benjamin Ogle*, esquire, and *Henry Margaret*, his wife, of *Anne-Arundel* county, in the state of *Maryland*, of the one part, and *James Bosley*, son of *Charles*, of *Baltimore* county, in the state aforesaid, of the other part," and that "for and in consideration of the sum of fourteen hundred pounds common current money, to them in hand already paid," *Ogle*, and wife granted, &c. to *Bosley*, "all their, and each of their right," &c. "of, in and unto, a certain tract or parcel of land, being part of a tract of land called *Hill's Forest*, lying in *Baltimore* county, containing by estimation four hundred and thirty-one acres, with all," &c. This deed was executed by *Ogle*, and wife, and acknowledged as follows: "Be it remembered, that the within named *Benjamin Ogle*, esquire, and *Henry Margaret*, his wife, came before us the subscribers, justices of the peace for *Prince-George's* county, of the state of *Maryland*, and acknowledged the within deed to be their act, and the lands and premises, with their appurtenances, thereby bargained and sold, to be the estate of the within named *James Bosley*, son of *Charles*, his heirs and assigns, for ever: And the said *Henry Margaret*, wife to the said *Benjamin Ogle*, esquire, being by us examined pri-

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vately out of the hearing of her husband, declared that she made the above acknowledgment willingly and freely, and without being induced thereto by force or threats of ill-usage by her husband, or fear of his displeasure.

Taken and certified, *Thos. Williams*,
Thos. Boyd."

At the foot of the acknowledgment was the following *certificate*, given by the clerk of *Prince-George's* county court: "*Prince-George's* county, to wit: In testimony that *Thomas Williams* and *Thomas Boyd*, gentlemen, before whom the above acknowledgment was made, and who have thereto affixed their signatures, were at the time of taking and affixing the same, and still are, two of the justices of the peace for the county aforesaid, *legally authorised and assigned*, and to all certificates by them so signed, due faith and credit is and ought to be given as well in justice courts, as thereout, I have hereunto set my hand, and affixed the public seal of office, this 14th day of July, Anno Domini 1777.

(Seal.)

John Read Magruder, Clk."

The deed, with the several endorsements thereon, was recorded amongst the land records of *Baltimore* county, on the 20th of September 1777. The plaintiff then offered evidence to the jury, by the testimony of *Benjamin Ogle*, esquire, one of the grantors named in the deed, who deposed that in 1774 he became seized and possessed of an estate in *Prince-George's* county, called *Belle Air*, upon which estate there then was, and still is, a large and commodious furnished house; that he considered the city of *Annapolis*, near to which he had a large landed estate, as the place of his residence from the year 1770 down to this time; that in the county of *Anne-Arundel* he voted, was summoned to serve as a juryman, and was permitted to enjoy the right of passing the various ferries in the said county without paying ferriage, none of which privileges or immunities were ever enjoyed by him in the county of *Prince George's*. That from the time he became possessed of the estate called *Belle Air*, until the year 1790, it was customary for him occasionally, every year, to go with his family to that estate, and live there for a time, sometimes for a longer and sometime for a shorter period of time. That on the 25th of June 1777, he was with his wife at his seat

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called *Belle-Air*, in *Prince-George's* county, (their children being at *West-River*,) and there, together with his wife, executed and acknowledged the deed from himself and wife to *James Bosley*. That he was himself in the city of *Annapolis* in August 1777, when the *British* fleet passed up the *Chesapeake* bay, but that his family were then at *Belle-Air*. The plaintiff, with the consent of the defendant, produced and read in evidence the deposition of *John Thomas (a)*, in the following words: "That he hath, from an early period of his life, been acquainted with *Benjamin Ogle*, esquire, and with his lady; that Mr. *Ogle* resided, and still resides, in the city of *Annapolis*, where he has a large and commodious house and lot, his place of residence, and near to which city he held, and still continues to hold, a large and valuable landed estate; that previous to the year 1777, Mr. *Ogle* recovered, by a suit in chancery, from his late uncle, Col. *Benjamin Tasker*, a valuable landed estate in *Prince-George's* county, and that Mr. *Ogle*, during the summer season, generally, with his lady, spent a great part of his time at *Belle Air*, on the land recovered as aforesaid, but that his household furniture and servants still remained at his dwelling-house in *Annapolis*. He well remembers that Mr. *Ogle* and family remained at *Annapolis* the first part of the year 1777, he thinks until the month of April, or the beginning of May, and that Mr. and Mrs. *Ogle* were at *Belle Air* the latter part of the month of that year. In June of the same year, this affirmant was twice at Mr. *Ogle's* dwelling-house in *Annapolis*, where he and his lady then were, with his servants, and that this affirmant, as he had been accustomed for many years, lodged there. He may have been oftener with them, but of that he has no distinct recollection. That in August and September Mr. and Mrs. *Ogle* were at *Belle Air*; that in the fall of 1777 his kitchen, in *Annapolis*, was burnt down. However they were in said dwelling-house in the spring of 1778. The winter following they resided in the now government-house, and remained there until the spring of 1779. That he always did, and doth now, consider *Annapolis* as the place of residence of Mr. *Ogle*, and that he never did reside in

(a) Mr. *Thomas* resided at *West River*, and was uncle to Mrs. *Ogle*.

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Prince-George's county; his retiring there in the summer season, he conceived as a visit from home, and not as going to constitute a new residence." The plaintiff also offered in evidence, by the testimony of Mrs. *Mary Ridout*, sister to *Benjamin Ogle*, that her brother, upon his marriage, which took place in September 1770, settled in *Annapolis*, and has resided there ever since. That when he got possession of his estate called *Belle Air*, there was upon it a large and commodious furnished dwelling-house; that it was usual for him to go occasionally every year with his family and spend sometime at his seat; that she cannot now recollect when her brother first began to reside occasionally at his said country seat, nor can she recollect the time or season of the year when he usually went to it, but she remembers that she herself spent the summer of 1777 at *Bath*, in *Virginia*, and upon her return home from *Bath*, in the month of September 1777, she called at the seat of her brother in *Prince-George's* county, called *Belle Air*, and spent some days there; at that time her brother and his family were residing there. Being asked by the counsel for the defendant, whether she considered *Belle Air* or *Annapolis* the place of residence of her brother? she answered, both; that in her estimation, when a gentleman had a town house, and country house, and occasionally spent part of his time at each of them, he resided in both of them. The defendant then produced, and swore to the jury, *Henry Margaret Ogle (a)*, who deposed, that about the middle of *May* 1777, her grand-mother died; that about this period, or some short time before, she sent her children to *West River*, in *Anne-Arundel* county, to the house of her uncle Mr. *John Thomas*, to keep them from taking the small pox, which then prevailed in *Annapolis*, that the children continued at *West River* for two or three months; that Mr. *Ogle* and herself, and at times

(a) The counsel for the plaintiff objected to Mrs. *Ogle's* being examined, contending that she was called to defeat her own deed. The case of *Wilmot vs. Talbot*, 3 *Harr. & M'Hen.* 2, was cited by the defendant's counsel to show, that a wife was examined to prove that her husband had destroyed the will of his father, whereby he had devised the land in question to his grandson.

Chase, Ch. J. The Court are of opinion, that Mrs. *Ogle* is a legal and competent witness. The acknowledgment of the deed made by her is defective, and the deed does not operate to convey more than Mr. *Ogle's* life estate, and the verdict in this case would not be evidence for her or her heirs.

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herself only, went to see them at *West River*, and in going to *West River* from *Annapolis*, and from *West River* to *Annapolis*, she and Mr. *Ogle* occasionally called at *Belle-Air*, their seat in *Prince-George's* county, and staid one or two nights; but she does not remember ever to have staid at *Belle-Air* more than two nights, unless her children were with her. That the deed from Mr. *Ogle* and herself to *Bosley*, of the 25th of *June* 1777, was executed at *Belle-Air*, on one of those occasional visits when she and Mr. *Ogle* were passing from *Annapolis* to *West River*, or from *West River* to *Annapolis*. That it was executed just before they left *Belle Air*, which she well remembers, because, seeing persons coming to the house, she was afraid she should be detained at *Belle Air*; that the persons proved to be the party who bought the land, coming to tender continental money in payment of it, and to have the deed executed. That she and Mr. *Ogle* had not their children at *Belle Air* in the year 1777, until after Mr. *Ogle's* return from *Berkley* county. That *Annapolis*, in *Anne-Arundel* county, she always considered their place of residence. That at different times of the year, and of different years, they occasionally spent part of their time with their family at *Belle Air*, and in some years they went to *Belle Air* only for a day or two at a time. That Mr. *Ogle* has a large landed estate in his cultivation nearly adjoining to *Annapolis*. The defendant also proved by *Benjamin Ogle*, that he went in the year 1777 to *Berkley* county, in *Virginia*; that he went there after the 25th of June 1777, and returned before the 10th of July 1777, and that in 1777 he did not take up his temporary residence at *Belle Air*, until after his return from *Berkley*. That he was at *Belle Air* in 1777, before the execution of the deed, and at its execution, but does not remember the time he went there, nor how long he staid there. That from *Annapolis* to Mr. *John Thomas's* at *West River*, is 14 miles, to *Belle Air* is 18 miles, and from *Belle Air* to *West River* is 14 miles. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they are satisfied from the evidence that *Benjamin Ogle* had and kept two dwelling-houses furnished, to wit, a town house and country house, from the year 1774 to the year 1780, the town house situate in *Annapolis*, in the

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county of *Anne-Arundel*, the country house situate in the county of *Prince-George's*, and that during the time his residence was principally in *Annapolis*, tho' in each of the years aforesaid he occasionally went with his family to his country house in *Prince-George's*, and resided there for a time, sometimes for a longer and sometimes for a shorter period in each of the years aforesaid, and that he with his wife were, on the 25th of June 1777, at his country house in *Prince George's* county, and then and there, with his wife, executed the deed of that date to *Bosley*, that then the deed, so executed, was and is good and sufficient in law to pass and transfer, from *Ogle* to *Bosley*, all the interest which *Ogle* then had in and to the lands mentioned in, and intended to be conveyed by, the deed.

Martin, (Attorney General,) and *Mason*, for the plaintiff, stated, that the question was, whether Mr. *Ogle* had, on the testimony in the cause, such a *living* or *residence* in *Prince-George's* county as to justify his acknowledging in that county the deed from him and wife to *Bosley*? Or whether a deed acknowledged in *Prince-George's* county, before two justices of the peace of that county, for lands lying in *Baltimore* county, by persons who are stated in the deed to be of *Anne-Arundel* county, was a good and sufficient deed in law to pass and transfer the estate to the grantee? To show that Mr. *Ogle* had a sufficient residence in *Prince-George's* county, to enable him to execute the deed in that county, they referred to the acts of 1715, *ch* 47, *s*. 8, 9, and November 1766, *ch*. 14, *s*. 2, 3. *Sim & Lee's Lessee vs Deakins*, 2 *Harr. & M'Hen* 46. *Johns. Dict*. tit. *Reside*. *Foster's Cr. L*. 76; and 4 *Coke*, 40.

Pinkney, *Key*, *Johnson & Harper*, for the defendant, stated, that the question submitted to the court was, what constituted a *residence* within the meaning of the act of November 1766, *ch*. 14, *s*. 2, 3? They contended, 1. That at the time the deed from *Ogle* and wife to *Bosley* was executed, the grantors did not reside in the county of *Prince-George's*, and, therefore, that deed did not transfer the estate thereby intended to be conveyed, to the grantee. They referred to the acts of 1715, *ch*. 47, *s*. 8, 9; November 1766, *ch*. 14, *s*. 2, 3, July 1729, *ch*. 8 *s*. 5; 1793, *ch*. 53, *s*. 7, 22; and 1796, *ch* 43, *s*. 14. *Const. Art*. 2, 16, 42. The act of 1799, *ch* 50, *s*. 11, 12. *Johns*.

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Dict. tit. *Reside—Residence—Resident*, and the several examples. *Boyer's Dict.* tit. *Resider. Cunn. Dict.* tit. *Residence. Jacob's L. D.* tit. *Resiance—Resiant.*

2. They also contended, that the certificate made on the deed by the clerk of *Prince-George's* county court does not pursue the words of the act of assembly of November 1766, *ch.* 14, *s.* 3, he having used the words "*legally authorised and assigned*," instead of the words of the act, "*duly commissioned and sworn.*" That intendment could not be admitted to supply the omission of the words used in the law; and that if intendment could be admitted, there was not sufficient matter stated in the certificate to show that the justices had been sworn. They referred to the several decisions made by this court as to the acknowledgments of deeds by *femes covert* grantors, also the acts of February 1777, *ch.* 5, & 1796, *ch.* 43, *s.* 17; and *Dyson vs. West*, 1 *Harr. & Johns.* 567.

Martin, (Attorney General,) and *Mason*, in reply to the *second point*, referred to the acts of 1785, *ch.* 9, *s.* 8, 9, and 1797, *ch.* 103. *Griffith's Lessee v Ridgely*, 2 *Harr. & M'Hen.* 418; and *Sim & Lee's Lessee vs. Deakins*, *Ibid* 46.

Chase. Ch. J. The court are of opinion, that this case is not distinguishable from the case of *Sim & Lee's Lessee vs Deakins*, and that the principles of that case must govern. In that case *Warder*, by coming into *Maryland*, acquired a temporary residence sufficient, under the act of assembly, for the purpose of executing and acknowledging the deed. That while in *Maryland* he owed temporary allegiance, and during his residence was subject to the laws.

By the law of nations a stranger is subject to, and has the protection of the laws of the country or state into which he may go. But the court are of opinion, that the term *residence* is a general term merely to express the abode of the person.

The court are of opinion, that if the jury should find that *Benjamin Ogle's* principal residence was in *Annapolis*, in *Anne-Arundel* county; that he voted, served on juries, and was enrolled in the militia in that county, and no other county; and that from the year 1774 to the year 1780, he with his family temporarily resided at *Belle Air*, in *Prince-George's* county, during the summer and au-

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town of the said years, sometimes for a longer and sometimes for a shorter time; and should also find that he was with his wife at his said seat in *Prince George's* county on the 25th of June 1777, the time of the execution of the deed to *Bosley*, although they should find that he, with his wife, on the said last mentioned day, stopped at *Belle Air*, his temporary residence in *Prince-George's* county, for a short time only, on their way to or from *West-River*, in *Anne-Arundel* county, and during such continuance executed and acknowledged the deed to *Bosley*; and that *Ogle*, with his wife, immediately after the execution and acknowledgment of the deed, left *Belle Air*, and did not go thither with his family to remain during a part of the summer and autumn, according to his said custom, until several weeks after the time of executing the deed; that then the deed is good and valid in law to pass and transfer all the interest of *Ogle* in the land to *Bosley*.

The court do not say, that a person going from one county to another can acknowledge a deed for lands laying in a different county; but that a temporary residence, and not a mere transitory residence, is sufficient for that purpose.

The clerk of the county court is a person intrusted to make the certificate, that the persons, before whom the acknowledgment of the deed was made, were justices of the peace of the county. He had a knowledge of the facts whereupon to ground his certificate, which is to authorise the recording the deed. The court think a substantial compliance with the directions of the act is all that is requisite; and the court consider the words used in the certificate are words of that import. The words *legally authorised*, are of the same import as "*duly commissioned and sworn.*" The court consider that the justices could not be legally *authorised* unless they had been *commissioned and sworn.*

The court are of opinion, that the certificate of the clerk of *Prince-George's* county court, endorsed on the deed from *Benjamin Ogle* and wife to *James Bosley*, is good and sufficient in law to warrant the enrolling the deed by the clerk of *Baltimore* county court among the land records of that county. The defendant excepted.

4. *The second bill of exceptions.* The defendant, to make title to the lands within the lines from figures, &c. on the plots in the cause, offered evidence to prove the plots and explanations; and gave in evidence the certifi-

cates *and patents (a)* of the tracts of land called *Cullen's Lot* and *Cullen's Addition;* the certificate of the former tract dated the 17th of June 1683, and of the latter tract dated the 25th of September 1683; and also gave in evidence the certificate and patent of *Hill's Forest* before mentioned. And also gave in evidence, that the whole of the land contained within the lines on the plots from 60, shaded blue, to red 7, to red 8, to red 9, to 61, and with the fence shaded yellow to 60, was in the actual possession, enclosure and cultivation, of the defendant, and those under whom he claims, claiming the whole thereof as his and their property for the space of *fifteen years*, and that then a fence was made from red 7 to X, and from X to 60, and the whole of the land included in the fence from X to red 7, red 8, red 9, to 61, to 60, to X, was continued for *seven years* as the fence and the inclosure of the defendant, claiming the same as his own before the bringing this ejectment. In this case the testimony was, that the fence from 60 to 52, to 53, and so on to 60, was made by the defendant, and those under whom he claims, before the year 1774, and continued to run thus until the year 1783, when the fence was altered, and run from 60 to red 7, 8, 9, black 61 to 60; that this last fence from red 7, 8, 9 to 61, was in the year 1782 put up by those under whom the plaintiff claims, and those under whom the defendant claims, jointly; that in the latter part of the year 1782, or beginning of the year 1783, the plaintiff, and those under whom he claims, put up the fence running from red 7 to X, as a fence belonging to *Hill's Forest*, and the owners thereof; that immediately after, in the year 1783, the defendant removed the fence from 60 to red 7, and run the same from 60 across to X, and joined the same to the fence so made by the plaintiff from red 7 to X. The defendant thereupon prayed the opinion of the court, and their directions to the jury, that if they were of opinion from the evidence, that the defendant, and those under whom he claims, have held by enclosure and cultivation for more than *twenty years*, the land included within the lines from 60 to red 7, and red 8, red 9, to 61 to 60, claiming the same as his own, that then he has title to the same by adversary possession, although before the expiration of the twenty years the fence and enclosure

(a) Neither of the tracts were patented.

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was removed from red 7 to X, to 60, and thereby enlarged the enclosure.

Chase, Ch. J. The Court refuse to give the direction prayed, being of opinion that if the jury should find that the plaintiff's lessor, under the direction of the court already given, hath made title to all the tract of land called *Hill's Forest*, except the 200 acres devised to *Nathaniel Richardson*; and should also find that the land, to which the defendant claims title by adversary possession, in manner herein stated, is included within the true location of *Hill's Forest*, that in such case the defendant has no title to the land by adversary possession, having abandoned it by removing his enclosures. The defendant excepted.

5. *The third bill of exceptions.* The plaintiff to make title to the land claimed by him in this action, read in evidence to the jury the certificate and patent of *Hill's Forest*, and showed a title to the land in the lessor of the plaintiff, under the grantee of the land; and to prove that the said tract is truly located on the plots by him as his claim and pretensions, gave in evidence the plots, and the certificate of a tract of land called *Thompson's Choice*, surveyed for *James Thompson* on the 12th of March 1679, in virtue of a warrant for 550 acres, granted him the 14th of January 1679, and also a warrant granted him the 24th of January 1679, for 250 acres, whereby "was laid out for the said *Thompson* a tract of land called *Thompson's Choice*, lying in *Baltimore* county, on the Ridge of *Gunpowder* river. Beginning at a bounded oak, being the westermost bounds of a tract of land late laid out for Major *Sewell* (a), and running W 500 perches to a bounded oak standing *by the great falls*, and running N from the said oak 320 perches, then E 500 perches, then with a straight line to the first bounded tree, containing and laid out for 1000 acres of land more or less." And also gave evidence to prove, that the land called *Thompson's Choice* is truly located by him on the plots. He also offered evidence to prove the true location of *Thompson's Choice* to be from the letter Q on the plots, and from thence to R, to S, to T, to Q. The defendant then offered evidence to prove, that the true location of the said land was from I. thence to 10, to 11, to 12, to I. There was no evidence given

(a) Called *Sewell's Fancy*.

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that *Thompson's Choice* was ever run, held or claimed, by any person interested in the said land, as running from its beginning to *Gunpowder* river, except so far as relates to the field at the figures 10 on the plots, which field was laid down and proved by the plaintiff as an ancient possession under the title of *Thompson's Choice*. The defendant then prayed the opinion of the court, and their direction to the jury, that inasmuch as no evidence has been given of the bounded tree called for by the certificate of *Thompson's Choice*, at the end of its first line, nor of the place where the tree stood, the first line must, according to, and by virtue of the expressions in the certificate, be run so as to terminate at the great falls of *Gunpowder* river, from whence the remaining courses of the land must be run according to the courses and distances expressed in the certificate thereof.

Chase, Ch. J. The court refuse to give the direction as prayed. The court are of opinion, and so direct the jury, that the expressions of the certificate of *Thompson's Choice*, as to the termination of the first line thereof, do not operate to bind that line to terminate at the great falls, although no evidence be given of the tree or of the place where it stood. The defendant excepted.

6. The defendant offered in evidence the declarations of Col. *Young*, deceased, then seized of *Sewell's Fancy*, to prove the end of the first line of that tract, which is the beginning of *Thompson's Choice* located by the defendant.

Chase, Ch. J. The court reject the declarations offered in evidence, *Sewell's Fancy* not being located on the plots; and although the second line of that tract runs off from *Thompson's Choice*, yet *non constat* that *Young* was not attempting to carry back the first boundary or beginning of *Sewell's Fancy*, or thus interested.

Verdict. "The jury find for the plaintiff, and say that the true location of *Hill's Forest* begins at T, and runs to U, thence to V, thence to W, thence home to T. They further say the true location of *Cullen's Lot* begins at A, and runs to B, thence with the manor line to C, thence to I, thence home to A. That *Cullen's Addition* begins at C, standing on the manor line, then runs to D, to G, to

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H, thence home to C; and lastly, they find for the plaintiff all the lands called *Hill's Forest*, as above located, which lies clear of the lands called *Cullen's Lot*, and *Cullen's Addition*, as above located, and which lies to the eastward of the said division line between the plaintiff's lessor and *Joseph Slee*, from red B to red A continued, until it intersects the out line of *Hill's Forest* as above located." *Judgment*. That the plaintiff recover against the defendant "his term yet to come and unexpired of, in and unto, all that part of the tract of land called *Hill's Forest*, situate in *Baltimore* county aforesaid, located upon the plots returned in this cause, beginning at the letter T, and running to U, thence to V, thence to W, and thence home to T, which lies clear of the land called *Cullen's Lot*, also located upon the said plots, beginning at A and running to B, thence with the manor line to C, thence to I, and thence home to A, and which lies also clear of the land called *Cullen's Addition*, also located on the said plots, beginning at C, standing on the manor line, then running to D, then to G, then to H, and thence home to C, and also which lies to the eastward of the division line between *James Gittings*, the lessor of the plaintiff, and *Joseph Slee*, from red B to red A continued, until it intersects the out line of the said land called *Hill's Forest* as above located, so as aforesaid by the jurors aforesaid found," &c. On this judgment the defendant brought a writ of error returnable to this court.

The cause was argued at the last term, before BUCHANAN, NICHOLSON, and GANTT, J.

Key, *Harper*, and *Johnson* (Attorney-General,) for the Plaintiff in error, in arguing the points which arose under the *first* bill of exceptions, referred to the same authorities which were cited on the part of their client in the general court.

On the *second* bill of exceptions, they stated that the principle established by the general court, in their opinion given in this bill of exceptions was, that if a man has a parcel of land under inclosure for 15 years, and then enlarges the parcel, and holds the whole by inclosure for seven years, he did not acquire a title in the first parcel by 20 years possession by inclosure. In opposition to

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which they cited *Russell's, Lessee vs. Baker*, 1 *Harr. & Johns.* 71.

On the *third* bill of exceptions they cited *Howard vs. Moale, et al. Lessee*, (*ante*, 269, 270.)

They objected to the *verdict* and *judgment* on two grounds—1. For uncertainty; and 2. For excess over and above the demand—the verdict and judgment being for more land than was claimed in the action. They cited 2 *Bac. Ab.* tit. *Damages*, (D. 2.) *Ibid* tit. *Error*, (K. 6.) *Crumpton vs. Smith*, *Yelv.* 5. 1 *Bulst.* 49. *Clements vs. Waller*, 4 *Burr* 2156. *Cuming vs. Sibly*, *Ibid* 2490. *Parker vs. Harris*, 1 *Salk.* 162; and *Philips vs. Bury*, 1 *Ld. Raym.* 6.

Martin and *T. Buchanan*, for the Defendant in error, in their argument on the *first* bill of exceptions, relied upon the authorities cited on the part of the plaintiff in the court below.

On the points respecting the *verdict* and *judgment*, they cited 7 *Bac. Ab.* tit. *Verdict*, (M.) *Co. Litt.* 227. a. *Trials Per Pais*, 298, 304. *Carter's Rep.* 80, 94. *Vin. Ab.* tit. *Trial*, 407, pl. 29. 2 *Roll. Ab.* tit. *Trial*, 707, pl. 42. 2 *Bac. Ab.* tit. *Ejectment*, (F.) The act of 1805, *ch.* 65, *s.* 44. 1 *Tidd's Pr.* 662, 663. *Sullivane vs. Seagrave*, 1 *Stra.* 695. 2 *Bac. Ab.* tit. *Ejectment*, (D. 2.) 419, 420. *Cottingham vs. King*, 1 *Burr.* 629. *Conner vs. West*, 5 *Burr.* 2673; and *Howard vs. Moale, et al. Lessee*, (*ante* 249.)

The Court, at this term, dissented from the opinions of the General Court in the *first* and *second* bills of exceptions, and concurred with that in the *third* bill of exceptions. But the court were of opinion, that the certificate of the clerk of *Prince-George's* county court gave an authority to the clerk of *Baltimore* county court to record the deed from *Ogle* and wife to *Bosley*, mentioned in the *first* bill of exceptions, the court considering the words "*legally authorised and assigned*," within the meaning of the act of November 1766, *ch.* 14.

JUDGMENT REVERSED.

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BRYDEN vs. TAYLOR.

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A special authority must be strictly pursued

Where a person acted in the character of a justice of the peace, although he did not so style himself, yet it is *prima facie* evidence that he had authority to act as such

A permanent residence of a witness is not necessary for the purpose of taking his deposition under the act of July 1779, ch. 8, to perpetuate testimony; but a temporary or transient residence is sufficient. The fact of residence need not be placed on record

What is alleged as a motive or inducement in the deposition made by a witness, may be read in evidence

The minutes of the proceedings of a notary public of a foreign country are to be considered as records, under the courtesy of nations; and a copy under the hand and notarial seal of a notary is sufficient evidence of the protest of a foreign bill of exchange

Where a person was frequently seen in the counting house of the plaintiff, transacting business as a principal, and was generally supposed, believed, and understood in the town, to be a partner in the house of the plaintiff, *held* not sufficient evidence to prove that such person was a partner of the house of the plaintiff

In *assumpsit* on a foreign bill of exchange the plaintiff is to recover as much money as will, at the time of the verdict, purchase a similar bill

ERROR to the General Court. The defendant in error brought an action of *assumpsit*, upon a foreign *bill of exchange*, drawn on the 23d of July 1799, by *C. F. C. Beseke*, of *Baltimore*, on *J. A. & D. H. Rucker*, of *London*, in favour of *Wm. B. Magruder*, for £230 sterling money, and payable 60 days after sight. The bill was endorsed by *Magruder* to the defendant, (now plaintiff in error,) and by him endorsed to the plaintiff below. It was protested for *nonacceptance* on the 14th of September 1799, and for *nonpayment* on the 16th of November 1799. The general issue was pleaded.

1. *The first bill of exceptions.* The plaintiff at the trial at May term 1805, to prove that he had given to the defendant due notice of the nonacceptance of the bill of exchange, on which the suit was brought, and of the protest for such nonacceptance, offered in evidence a deposition, which, together with the several endorsements thereon, and certificates thereto annexed, was as follows: "*Baltimore*, 3d March 1803. During the absence of *William Taylor*, from *Baltimore*, I received *Francis Brown's* letter directed to him in November 1799, which letter was dated the 13th of September 1799, containing advice of *C. F. Beseke's* bills, 23d July 1799, for £230 and £120 sterling, on *J. A. & D. H. Rucker*, *London*, being protested for nonacceptance, of which I duly notified *James Bryden* immediately. In the month of February 1800, immediately on receipt of the news that the bills were protested for nonpayment, I returned in the brig *John Brickwood*, from *London*, (which appears by *Francis Brown's* letter of 21st November 1799.) I notified *James Bryden* thereof by order of *William Taylor*, and immediately subsequent I heard various conversations between *William Taylor* and *James Bryden* on the subject. The second set which *W. Taylor* wrote for to *England*, as soon as it was believed the *John Brickwood* was lost, arrived at *Baltimore* in September 1800, enclosed in *Francis Browne's* letter of 28th June 1800, while *W. Taylor* was out of town, I was then his agent and in town. Immediately on receipt of the bills, I called at *James Bryden's*, but did not find him; I called again very shortly afterwards and demanded payment for the said bills of the said *James Bryden*, from whom I could get no satisfaction. In con-

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firmation of the loss of the *John Brickwood*, I have examined the journals of the *Marine Insurance* office of this city, and find the following entry under date of the 9th December 1800: "The *Marine Insurance* Office, Dr. to *D Stewart & Sons*. For total loss on brig *John Brickwood*, insured the 10th of January last, on policy No. 504, she having sailed from the *Downs* the 10th December 1799, and no account of her since—it is concluded she has foundered."

William O. Payne.

Sworn to before me, by *William Osborn Payne*, on Thursday the 3d of March 1803, at 4 o'clock in the afternoon, at my office in the city of *Baltimore*.

Owen Dorsey.

To *James Bryden*. Take notice, that I shall attend at the office of *Owen Dorsey*, Esquire, in the city of *Baltimore*, on the third day of March next, at the hour of four o'clock post meridiem, to take the deposition of *William O. Payne*, to be read in evidence in two suits brought by me against you in the general court for the Western Shore of *Maryland*.

Wm. Taylor.

February 8th, 1803.

Between the hours of twelve and one o'clock P. M. on Wednesday the 9th of February 1803, I delivered to *James Bryden*, at his dwelling in Light-street, *Baltimore*, a true copy of the within notice.

Wm. Y. Lewis.

Sworn to before me the 3d March 1803.

Owen Dorsey.

Received to be recorded, the 19th day of May 1804. Same day recorded and examined.

Wm. Gibson, Clk."

The whole was certified under seal of office by the clerk of *Baltimore* county court. The plaintiff also gave in evidence, that *W. O. Payne*, in the deposition mentioned, was dead. The defendant objected to the reading of the deposition in evidence.

Chase, Ch. J. The court accede to the principle that special authorities must be strictly pursued. But they are of opinion, that it appears upon the face of the deposition that it has been properly taken.

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The court are of opinion, that the act of assembly of July 1779, *ch.* 8, entitled, "*An act establishing a mode to perpetuate testimony.*" does not require an efficient residence, such as would make a person a domicil, qualify him to vote or to be capable of holding an office; but a temporary or transient residence is sufficient; and it appears to the court, that the requisites of the said act of assembly has been complied with.

The witness being in the county at the time the deposition is taken, is alone necessary; unless it were so, no person but a judge of the general court would be competent to take the testimony of transitory witnesses.

The twenty days notice is not only for the purpose of giving the opposite party time to appear, but to inquire into the character of the witness.

The act of assembly does not require the fact of residence to be put upon record. The defendant excepted.

2. The defendant objected to the reading that part of the deposition which states that the deponent, as clerk of the plaintiff, received letters directed to the plaintiff stating the protest, in consequence of which he gave notice to the defendant as indorser of the bill of exchange.

Chase, Ch. J. That part of the deposition is only *inducement*—Let it be read.

3. *The second bill of exceptions.* The plaintiff, to prove that the bill of exchange in the declaration mentioned was duly protested for nonacceptance, offered in evidence a paper purporting to be an extract under notarial seal from the books of the notary by whom the said protest was supposed to have been made: "Extract from the protest book marked *C*, fol. 440, begun the 2d of June 1798, and ended the 8th of November 1799, formerly belonging to *David Guillonneau*, late of *Pope's Head Alley*, *London*, notary public, deceased, and now in the possession of his successor, *Benjamin Newton*, of the same place, notary public.

Baltimore, July 23d, 1799.

Exchange for £230 0 0 sterling.

Sixty days after sight, this my first of exchange, pay to *William B. Magruder*, esq. or order, the sum of two hundred and thirty pounds sterling, value received, which place to account *B.* & *W.* as advised by

C. F. C. Beseke.

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To *J. A.* & *D. H. Rucker*, esq. *London*, endorsed, Pay to Mr. *James Bryden*, or order, value received.

W. B. Magruder,
James Bryden.

Pay Messrs. *Emmott* & *Browne*, or *Francis Browne*, or order of either, value with *Wm. Taylor.*

On the fourteenth day of September *Anno Dni.* 1799, at the request of Mr. *Francis Browne*, of *London*, merchant, I *David Guillonneau*, notary public, dwelling in *London*, duly admitted and sworn, went with the original bill of exchange, whereof the aforegoing is a copy, to the house of *J. A.* and *D. H. Rucker*, esqrs. on whom the same is drawn, where having exhibited the said bill to a man servant belonging thereto, I demanded acceptance thereof, whereunto he answered that the said *J. A.* & *D. H. Rucker*, were not within, and had not left any orders for acceptance of the said bill. Whereupon, I, the said notary, at the request aforesaid, have protested against the drawer of the said bill, and all others concerned, for exchange, re-exchange, and all costs, damages and interest, suffered and to be suffered for want of acceptance of the said bill of exchange. Thus done and protested in *London* aforesaid, in the presence of *John Denton* and *Philip Lamendin*, witnesses. In *testimonium veritatis.*

(Seal.) *Dav. Guillonneau*, Not. Pub.

Faithfully extracted by me, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and four.

In *Testimonium Veritatis*,
(L. S.) *Benjamin Newton*, Not. Pub."

The defendant objected to the reading of this paper in evidence.

Chase, Ch. J. The court are of opinion, that the minutes of the proceedings of a notary public are to be considered as records under the curtesy of nations; and that a copy, under the hand and notarial seal of the notary, is sufficient evidence of the protest of a foreign bill of exchange for nonacceptance.

If none but the original would be evidence, what a situation would the party be in where there are different endorsers in different countries? In such cases copies must be sent, and they are always received as evidence. The defendant excepted

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4. *The third bill of exceptions.* The defendant, to prove that the plaintiff at the time of the drawing and endorsing the bill of exchange mentioned in the declaration, was in partnership in trade with a certain *John Taylor*, under the firm of *William Taylor*, and that *John Taylor* was a dormant partner in the said house of *William Taylor*, at the time of such drawing and endorsements, gave evidence that *John Taylor* was at that time in *Baltimore*, where the business of the house of *William Taylor* was carried on, and was frequently seen in the counting house of *William Taylor*, transacting business, receiving applications, and giving answers as a principal in the business, and was generally supposed, believed and understood, in *Baltimore*, to be a partner in the house of *William Taylor*. And it also appeared in evidence, that *John Taylor*, for several years before the drawing and indorsement of the said bill of exchange, resided in *London*, and there carried on business under the firm of *John Taylor & Co.* and that at the times of the drawing and endorsement of the bill, *John Taylor* had recently come from *London* to this state, in bad health, and did not remain in this country longer than 12 or 18 months, when he returned to *London*; and that during a part of his stay in this state, and at the times of the drawing and endorsement of the bill, he resided at a country seat rented by him in the neighbourhood of *Baltimore;* and that *William Taylor* did then, and for a long time before and afterwards, carry on trade and business in *Baltimore* in his own name alone, and not in the name of *William Taylor, & Co.* or in the names of *William* and *John Taylor.* The defendant then prayed the opinion of the court, and their direction to the jury, that if they shall be of opinion from the evidence so offered, that *John Taylor* was at the times aforesaid a partner in the house of *William Taylor*, that the plaintiff is not entitled to recover in this action.

Chase, Ch. J. The Court are of opinion, that the evidence offered is not sufficient to prove that *John Taylor* was a partner of the house of *William Taylor*, and therefore they refuse to give the direction prayed. The defendant excepted.

5. A question arose as to the value of the sum of money mentioned in the bill of exchange, whether such value

under the act of 1785, *ch.* 38, should be at the time of the protest or at the time of the notice? It was stated by the attorney general, that the circuit court had decided, that the plaintiff might recover as much money as would purchase a new bill at the time of the verdict.

The Court said, that it had been often decided in this court, under the act of 1785, *ch.* 38, that the plaintiff is to recover as much money as will purchase a similar bill at the time of the verdict.

The verdict and judgment being for the plaintiff, the defendant brought the present writ of error.

The case was argued before Polk, Buchanan, Nicholson, and Earle, J.

Harper and *Purviance*, for the Plaintiff in error, stated that two grounds of objection were presented by the *first* bill of exceptions—1. That it did not appear that *Payne*, the witness, was a resident of the county where his deposition was taken, so as to give it effect under the act of July 1779, *ch.* 8; and 2. That it did not appear that *Owen Dorsey*, before whom the deposition was taken, was a person authorised by law to take it.

On the *first point*, they referred to the act of July 1779, *ch.* 8, *s.* 1, 2, 7, and the decisions of this court upon the acknowledgments of deeds by *femes covert* grantors. Also *Evans vs. Bonner*, 2 *Harr. & M'Hen.* 377. The acts of 1729, *ch.* 8, *s.* 5; 1763, *ch.* 13, *s.* 2; 1796, *ch.* 43, *s.* 14. *Const. Art.* 2, 15; and *Stevenson vs. Myers*, 1 *Harr. & Johns.* 102.

On the *second point*, they cited *Gordon vs. Hickman*, 4 *Harr. & M'Hen.* 217.

On the *second* bill of exceptions, they contended, that the copy of the notarial certificate of the protest of the bill of exchange, ought not to have been received in evidence, until a foundation had been laid for its reception, by proving that the original had been lost, &c. They cited *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 16; and *Gassaway vs. Dorsey*, 4 *Harr. & M'Hen.* 405.

On the *third* bill of exceptions, they contended, that the evidence offered was competent for the jury fairly to infer that there was a partnership.

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Martin, for the Defendant in error, on the *first* bill of exceptions, referred, as to the *first point*, to *Sim & Lee's Lessee vs. Deakins*, 2 *Harr. & M'Hen.* 46. *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 18. The acts of July 1779, *ch.* 8, and July 1721, *ch.* 14.

On the *second point*, he referred to *Carroll et al Lessee vs. Norwood*, 4 *Harr. & M'Hen.* 287; and *Ex parte Boilman & Swartwout*, 4 *Cranch*, 75.

On the *second* bill of exceptions, he cited *Walrond vs. Van Moses*, 8 *Mod.* 322, 323.

THE COURT were of opinion, that there was no error in the opinions expressed by the general court in the several bills of exceptions.

JUDGMENT AFFIRMED.

JUNE.

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The admissions by counsel of certain facts in a special verdict taken at a former trial between the same parties in the same action, are not evidence at a new trial of the same cause.

If slaves remain in the possession of the vendor, the bill of sale must be recorded; and whether they remain in his possession, is a matter of fact for the jury; if they find they were not in his possession, the bill of sale is not required to be recorded; and it is not evidence, although it was recorded, unless the execution of it is proved.

To lay the foundation for proving an original deed lost, the evidence must be given to the court. *(ante.)*

Proof being made of the loss of an original deed of mortgage of land and slaves, dated in 1763, the *inspeximus* was admitted to be read as legal evidence, although the deed was not recorded in the manner prescribed by law, so far as respected the slaves in dispute.

Where a deed is lost, or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the deed.

Certain facts refused to be admitted in evidence to prove, that a person who purchased certain slaves, and had made a voluntary gift of them, never paid any consideration for the slaves.

Certain acts and declarations of the defendant, subsequent to his sale of the slaves for which an action of replevin was brought, and before his insolvency, are not evidence to defeat the claim of the plaintiff.

An affidavit made by a debtor, and payment into the treasury under the tender law, admitted in evidence to prove the person was matched, and made the payment into the treasury.

Proceedings in chancery under an insolvent law, are not evidence in favour of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of that law.

A bill in chancery, with all the proceedings and decree thereon, cannot be read in evidence in an action between different parties from those named in the proceedings.

An answer in chancery, made by the respondents into motion derived from the present defendant, is not admissible in evidence. But the declarations of the defendant are admissible evidence; and a witness may recur to the answer, to refresh his memory as to the declarations made to him by the defendant.

No person will be permitted to disaffirm his own sale. He cannot set up his discharge under an insolvent law, to disaffirm his prior acts.

If a mortgage of slaves was taken by one, and the mortgagor claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgagee, the sale would transfer only the equitable interest, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee, and notwithstanding the after discharge of the vendor, under an insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts, in perfecting his title to the slaves, will cause in law to confirm, and not to defeat, his contract with the vendee.

If a debt is due on mortgage and on open account, and partial payments are made by the debtor, without any application, the law will apply the payments to the mortgage debt.

Declarations made by the defendant before and after his discharge under an insolvent law, may be given in evidence against him.

Payments made by a mortgagor are not to be applied to discharge a debt due on the mortgage, in favour of a purchaser of part of the property mortgaged, who had not paid for it, and who had made a gift thereof to his son, to defraud his creditors.

In an action of replevin, the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained.

APPEAL from the General Court. The present was an action of *replevin*, brought by the appellee for two negro

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slaves, *James* and *Harry*. The defendant, (the present appellant,) pleaded *non cepit* and *property*. General replication and issues joined. There had been a trial in this case in the general court at October term 1799, and judgment having been rendered for the defendant, the plaintiff appealed to the court of appeals, where the judgment was *reversed*, and a *procedendo* awarded for a new trial. See 4 *Harr. & M'Hen.* 405.

1. The defendant at the new trial at October term 1805, offered in evidence to the court, the admissions made by the plaintiff's counsel in the *special verdict* taken, at the former trial at October term 1799, to prove the existence of the mortgage therein stated.

Mason, for the Plaintiff, objected to this being done, and cited *Mahoney vs. Ashton*, 4 *Harr. & M'Hen.* 295, 322.

Chase, Ch. J. Facts are often admitted and stated for the purpose only of bringing a particular point of law before the court. As the finding of the jury, in the special verdict, was on the admissions of counsel, it is not evidence to prove the existence of the mortgage.

2. The defendant offered in evidence a bill of sale, for the negroes mentioned in the declaration, from *Clerke*, administrator of *Russell*, to *Edward Dorsey*, one of the original defendants in this action.

Mason, for the Plaintiff, objected to the bill of sale's being read, unless its execution was proved.

Chase. Ch. J. If the negroes remained in the possession of the vendor, the bill of sale is required to be recorded; and whether the negroes remained in the possession of the vendor, is a matter of fact for the jury; and if they find they were not in possession of the vendor, then the bill of sale is not evidence, although it has been recorded, without proof of its execution, it not, in such case, being a paper authorised by law to be recorded.

3. *The first bill of exceptions.* The plaintiff offered in evidence that the defendant, in the year 1782, being in possession of a number of negroes, sold them at public sale to the highest bidder; that at that sale *Thomas Gassaway*, the father of the plaintiff, purchased negro *James* in the declaration mentioned, and negro *Rachel*, the mother of

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Harry, the other slave in the declaration mentioned; *Harry* not being then born. That negroes *Rachel* and *James* were then delivered by the defendant to *Gassaway*, who held and possessed them, together with *Harry* after he was born, until 1789, when he gave negroes *James* and *Harry* to his son, the present plaintiff, and then delivered possession of them to him, who held and possessed them until the year 1796, when they were taken from his possession by the defendant. They were so taken some short time before the bringing of this suit. The plaintiff then proved that *James Russell*, herein after named, was in the (now state,) then province of *Maryland* in and during the year 1772. The defendant then offered evidence to the court (a), by the oath of *Robert Young*, that he was some years past the agent of *James Russell*, of *Great Britain*, and that as his agent he was in possession of a mortgage executed by the defendant to *Russell*; that the mortgage bore date in the year 1763. That he was well acquainted with the defendant and his handwriting, and that the mortgage was signed by the defendant. That he does not remember whether the mortgage was acknowledged before any judge or justice. That it was an original paper, and that to the best of his recollection, he delivered it, about 10 or 12 years ago, to *James Clerke*, then the administrator of *Russell*, who had died before that time in *G. B.* The defendant then read to the court the letters of administration granted to *James Clerke* on *Russell's* estate, dated the 11th of August 1789. He further proved by *Young*, that the mortgage purported to be a conveyance of a number of negroes by name from the defendant to *Russell*, and amongst those negroes were two, to wit, *Sempe* and *Cato*. He further proved to the court by the testimony of *Charles Walker*, that *Russell* shipped large quantities of goods, before the year 1763, to the defendant, and that *Charles Grahame* was the agent of *Russell*. That he was present, between the years 1760 and 1765, when *Grahame*, now deceased, and *William Lux*, now deceased, and the defendant, were together in the counting room of *Lux*, at which time the defendant executed some instrument of writing, which *Walker* witnessed, and that he never witnessed any other

(a) CHASE, Ch. J. To lay the foundation for proving that an original deed is lost, the evidence must be to the court.

executed by the defendant, in the presence of himself and *Lux*. He further offered in evidence to the court, by *Young*, that the original mortgage, herein before referred to, was delivered by him to *Clerke*, about the year 1797, for the purpose of sending the same to *Philadelphia*, to lay before the commissioners there in session, under the treaty with *Great-Britain*, to establish the claim of *Russell*. He further offered in evidence to the court, by *Edward Hall*, that *Clerke*, the administrator of *Russell*, in a conversation with him lately, informed him that all the papers delivered to him, *Clerke*, by *Robert Young*, relating to the claim of *Russell* against the defendant, were by him delivered over to *William Cooke*, Esquire, to prosecute his claim before the commissioners in *Philadelphia*. He then read in evidence to the court the deposition of *William Cooke*, Esquire, taken by consent, who proved, "that some years ago he was applied to by *James Clerke*, administrator of *James Russell*, late of *London*, merchant, to file a bill in chancery against *John Dorsey*, and *Luther Martin*, Esquire, and others, the bargainees of certain lands which they purchased of *Dorsey*, and which he had previously mortgaged to *Russell*; that among the papers delivered to him by *Clerke*, were several bonds passed by *Dorsey* to *Russell*, but the deponent cannot recollect whether the original mortgage, or a copy of it, was delivered to him. That he filed the bill in chancery, and while the suit was depending, he was applied to by *Edward Dorsey*, now deceased, to purchase sundry negroes, also included in the mortgage, and after consulting the complainant, this deponent agreed that the negroes should be valued by disinterested persons, which was done, and he sold the negroes at the valuation to *E. Dorsey*, and received from him, or from some other person on his behalf, the purchase money for the negroes, and paid the same over to the complainant. That it being afterwards ascertained that *John Dorsey* had not the legal title to the lands, or to some material part of them, at the time of executing the mortgage, the deponent exhibited a claim on behalf of *Clerke*, the administrator, to the commissioners then sitting at *Philadelphia* under the treaty of amity, commerce, &c. between *Great Britain* and *America*, and withdrew all the original papers which he had lodged in the court in the said suit, to present them, together with a memorial on behalf of the administrator, to the commission-

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ers, in order to obtain compensation for the money paid by *John Dorsey*, into the treasury of this state, towards satisfaction of the mortgage and several bonds. That he cannot charge his memory with the particular papers referred to, and filed with the memorial in the office of the commissioners, nor has he any recollection that any document was wanting to substantiate the claim. He has since searched among his own papers, and cannot find either bonds or mortgage from *J. Dorsey* to *Russell* in his possession, and that whatever papers were lodged with the commissioners, he the deponent has heard and believes, have since been removed to *Great Britain*; and from his not being able to find any of the said papers, the deponent believes they were all lodged by him with the commissioners, and are now in their possession in *Great Britain*."

The foregoing evidence was offered by the defendant to lay a foundation for proving that a deed of mortgage for certain negroes was executed by the defendant to *James Russell* in 1763, under and through which the defendant claimed the negroes for which the present suit is brought, and that the deed of mortgage is not in the power, possession or control, of the defendant. The defendant then produced an original record book, one of the land records of the general court, and offered to read to the court and jury the *inspeximus* of the deed, found on the records of the said court, from the defendant to *Russell*, dated the 6th of December 1763, and the marginal entry in the record book, stating said deed to be examined, as evidence of the contents of the original deed of mortgage, proved to have been executed by the defendant to *Russell* in 1763. To the reading of this paper from the record book, as evidence, the plaintiff objected.

Shaeff. Mason, and *Johnson*, for the Plaintiff, cited 1 *Morg. Ess.* 159, 160. *Page's case*, 5 *Coke*, 54. *Style*, 445. *Trials Per Pais*, 355, 434. *Eden vs Chalkill*, 1 *Keb.* 117. *Cheney's Lessee vs. Watkins*, 1 *Harr. & Johns.* 527. *Hall vs. Gittings's Lessee*, *(ante* 380.*)* *Peake's Evid.* 97, 110; *& Bull. N. P.* 255, 256.

Martin, *(Attorney General,)* and *Key*, for the defendant, cited *Hall vs Gittings's Lessee*, *(ante* 380.*)* *Peake's Evid.* 96; and 1 *Morg. Ess.* 161.

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CHASE, Ch. J. The question before the court now, is different from what it was on the former trial. Here the defendant has laid a foundation whereon to authorise the *inspeximus* of the deed to be read; and the question is, what other kind of evidence will be sufficient for that purpose?

Where a deed is lost or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the paper.

The court consider the *inspeximus* in this case to be a true copy. The clerk had authority to record the deed as to the real estate, and the copy is good as to the real estate. If it is a true copy as to the land, it is equally so as to the personal estate. The court consider it the next best evidence to the deed itself, and far preferable to parol proof.

This case is distinguishable from that of *Cheney vs. Watkins*. In that case there was no question about the *inspeximus* of the deed, that the court recollect of.

In the case of *Gittings vs. Hall*, it was the *inspeximus* of an ancient deed which needed no recording, and where the clerk had no authority to record it; but as the possession had gone with the deed, it was on those two grounds read.

The court are of opinion, that the *inspeximus* of the deed of mortgage, from the defendant to *James Russell*, is legal evidence, and admit the same to be read in evidence to the jury. The plaintiff excepted.

4. *The second bill of exceptions.* The defendant then read in evidence an affidavit, (on the files of the treasury,) made by him on the 18th of May 1781, before *Allen Quynn*, Esquire, a justice of the peace of *Anne-Arundel* county, [*See* 2 *Harr. Ent.* 250, *and the act of October* 1780, *ch.* 5, *s.* 11.] He also read in evidence the entry in the books of the treasurer, of the payment into the treasury by him, the defendant, on account of a debt due to *James Russell*, [*See* 2 *Harr. Ent.* 250 *and* 251, and the *act of October* 1780, *ch.* 5, *s.* 11.] He also produced and offered to read the record and proceedings in the court of chancery on his obtaining the benefit of an act of insolvency, to prove that *William M'Laughlin* and *Archibald Moncreiff*, were duly

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appointed his trustee (*a*). He also offered in evidence, that *M'Laughlin* and *Moncreiff* respectively accepted of the trust, and that *M'Laughlin* died about the year 1795, and that *Moncreiff* survived him; and also offered to read in evidence, from the records of the general court office, certain entries of a suit brought in that court in the year 1797, by *Moncreiff*, as surviving trustee of the defendant, against *Thomas Gassaway*, and the renewals thereof. He also offered to read in evidence the record and proceedings in the court of chancery in 1797, of *Thomas Gassaway's* having applied for and obtained the benefit of an insolvent law, in order to prove that *Thomas Gassaway* never paid any consideration for the negroes before his voluntary gift of them to his son, the plaintiff, nor at any time since (*b*).

Chase, Ch. J. The court refuse to admit the above facts to be given in evidence to the jury, to prove that *Thomas Gassaway* never paid any consideration for the negroes before his voluntary gift of them to his son, the plaintiff, nor at any time since; the court being of opinion, that the acts and declarations of the defendant in this case, subsequent to the sale by him to *Thomas Gassaway*, and whatever was consequent thereon, are not evidence to defeat the claim of the plaintiff. But the court are of opinion, that the affidavit and payment into the treasury, by the defendant in 1781, prior to the sale by him to *Thomas Gassaway*, are admissible evidence to prove the defendant was indebted to *James Russell*, and made the payment into the treasury in the manner therein stated. The defendant excepted.

5. *The third bill of exceptions.* The defendant then read in evidence, the affidavit made by the defendant before *Allen Quynn*, and on the files of the treasury; also the entry in the books of the treasurer, of the payment by the defendant into the treasury on account of a debt due to *Russell;* and also produced and offered to read the record and proceedings in the court of chancery, on the application of the defendant, and his obtaining the benefit

(*a*) The schedule returned, stated that *Russell* was a creditor, and *Thomas Gassaway* a debtor.

(*b*) *Gassaway*, in his schedule, returned the trustees of the defendant his creditors.

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of an insolvent law, to prove the acknowledgment and admission of the defendant in 1787, that his mortgage to *Russell* in 1763 was then outstanding unsatisfied. The defendant then prayed the opinion of the court, and their direction to the jury, that such evidence, though subsequent to the sale of the negroes by him to *Thomas Gassaway*, is competent evidence against *Gassaway*, or the plaintiff, he the defendant then holding and possessing the residue of the mortgaged property, or part thereof.

Chase, Ch. J. The court reject the evidence. The defendant excepted.

6. *The fourth bill of exceptions.* The plaintiff then produced, and offered to read in evidence, (for the purpose alone of proving that the mortgage from the defendant to *James Russell* was paid and satisfied before the commencement of the war between *America* and *Great-Britain*,) a bill in the court of chancery filed by *James Clerke*, administrator of *Russell*, against *Luther Martin*, *William Buchanan*, *Archibald Moncreiff*, *Robert Dorsey*, and *Wm. H. Dorsey*, with all the proceedings, and the decree of the chancellor thereon. To the reading of which the defendant objected.

Chase, Ch. J. The proceedings are between different parties, and, therefore, cannot be used as evidence in this case. If the decree had been that the mortgage debt was unsatisfied, it could not be used against the plaintiff, and the rule must be mutual.

Although the answer is in the handwriting of the defendant, yet he may have only acted as a clerk. He has not himself sworn to it.

The court refuse to let the proceedings be read to the jury for the purpose required by the plaintiff's counsel. The plaintiff excepted.

7. *The fifth bill of exceptions.* The plaintiff then cross examined *Robert Dorsey*, a witness produced on the part of the defendant, and proved by him, that he appeared, together with *Archibald Moncreiff* and *William H. Dorsey*, as the trustees of the defendant in this cause, to a bill in the court of chancery filed against them by *Clerke*, administrator of *Russell*, and made the answer, now produced, to that bill. That he obtained his knowledge of the respective facts, stated in that answer, from the de-

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fendant in this cause, and from his books, and that the answer is in the handwriting of the defendant in this cause. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if the jury are satisfied, from the evidence, that the respondents, named in the said answer, obtained their knowledge of the facts stated therein from the defendant, and the answer is in the handwriting of the defendant in this cause, that then the answer is evidence to prove the mortgage debt had been discharged as is stated in the answer.

Chase, Ch. J. The court are of opinion, that the declarations of the defendant are evidence admissible to the jury, and that the witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant. But the court refuse to allow the answer to be read in evidence to the jury. The plaintiff excepted.

8. *The sixth bill of exceptions.* The plaintiff then offered in evidence, by the testimony of *Robert Dorsey*, that the contract and purchase made by *Edward Dorsey*, with and of *William Cooke*, esquire, of the negroes mentioned in the declaration, as stated in the deposition of *Cooke*, was made by *Edward Dorsey*, at the request and for the benefit of the defendant, and that the money or price paid to *Cooke* for the slaves, was the money of the defendant; that *Edward Dorsey*, or his estate, he being dead, have no interest in the slaves, but that the defendant is the only person claiming under the purchase from *Cooke*. The defendant further offered in evidence, that he purchased the negroes in controversy in 1796, through *Edward Dorsey*, from *Clerke*, the administrator of *Russell*; that the negroes were sold by the defendant to *Thomas Gassaway*, under whom the plaintiff claims, in 1782. And to prove that he the defendant, between 1782 and 1796, obtained the benefit of an insolvent law, he produced in evidence the insolvent law passed at April session 1787, *ch.* 34; and also produced and read in evidence the record, proceedings, and release of him the defendant, under that insolvent law. He further offered in evidence, that the negroes in controversy are the descendants of negro *Rachel*, included in the mortgage from the defendant to *Russell*, and sold, as before stated, by the defendant to

Thomas Gassaway in 1782. The plaintiff then prayed the court for their opinion and direction to the jury, that if from the evidence the jury are satisfied that the purchase of the negroes named in the declaration made by *Edward Dorsey*, as stated in the deposition of *William Cooke*, was made by *Edward Dorsey*, by the authority and direction of the defendant, and for the benefit of the defendant, and that the purchase money paid to *Cooke* for the negroes was the money of the defendant, that then the plaintiff is entitled to their verdict for the negroes in the declaration named, and damages for the detention thereof.

Chase, Ch. J. The defendant cannot be permitted to disaffirm his own sale. He cannot be suffered to set up his discharge under an insolvent law to disaffirm his prior acts.

The court are of opinion, that if the jury find the mortgage was satisfied in the year 1782, when the defendant sold the negroes to *Thomas Gassaway*, that the plaintiff has a good title to them.

The court are also of opinion, that if the mortgage was subsisting in 1782, and the defendant sold the negroes, claiming the absolute ownership in them, and for a full consideration, although as to *James Russell* his sale would transfer only the equitable interest in the negroes; yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the negroes to the vendee, and according to good faith and honesty the subsequent acts of the defendant, in perfecting his title to the negroes, will enure in law to confirm, and not to defeat, his contract with *Thomas Gassaway*. The defendant excepted.

9. *The seventh bill of exceptions.* The plaintiff then offered in evidence, by the testimony of *Robert Dorsey*, that he understood from his father, the defendant, since the year 1790, that he had made considerable payments and remittances to *Russell*, between the years 1763 and 1776, in sterling money, amounting to £3,915 18 2; that *Russell's* administrator claimed the right to apply the money so paid to the satisfaction of certain debts due from the defendant to *Russell*, upon open account, contracted after the date of the mortgage, and that the representatives of

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the defendant claimed to apply the payments to the satisfaction of the mortgage. The plaintiff then prayed the court for their opinion and direction to the jury, that if they are satisfied that the said sums were paid at the times above stated, and there is no evidence to satisfy them that the payments when made were particularly applied to any specified debt, either by the defendant or *Russell*, that then the law will apply the same to the satisfaction of the mortgage.

Chase, Ch. J. There can be no doubt but the law will apply the payments to the satisfaction and discharge of the mortgage. The court give the direction prayed. The defendant excepted.

10. *The eighth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that the declarations of the defendant, which are said to have been made by him since the sale made by him to *Gassaway*, and since the insolvency of him the defendant, cannot be used in evidence by the plaintiff to the injury of the title and interest of *Russell*, or any other person claiming under *Russell*.

Chase, Ch. J. The court are of opinion, that the declarations of the defendant, are evidence against him. The defendant excepted.

11. *The ninth bill of exceptions.* The defendant then prayed the opinion of the court, and their direction to the jury, that as the defendant only insisted that the mortgage was paid by certain payments being made, which ought to be applied in the first instance to the mortgage in preference of other debts, not because he did not owe more, but that what he paid should be first applied to the mortgage—that the principle, that the payments so made, should apply to the discharge of the mortgage, should only be carried into effect in favour of *bona fide* purchasers having bought and paid for the articles, and not in favour of the plaintiff, whose father had not paid for the negroes by him purchased.

Chase, Ch. J. The court are of opinion, that the payments made by the defendant to *Russell*, if the jury shall find they were made as stated, ought to be applied to the

discharge and satisfaction of the mortgage in favour of the plaintiff, unless the jury shall find that *Thomas Gassaway* made the gift to his son, the plaintiff, to defraud his creditors. The defendant excepted.

12. *The tenth bill of exceptions.* The defendant further prayed the opinion of the court, and their direction to the jury, that unless the jury believe that the mortgage money was satisfied before the sale made by the defendant, or that the plaintiff, or his father, under whom he claims, had paid the purchase money for the negroes to the defendant or *Russell*, or some person entitled to receive the same, that the plaintiff was not entitled to recover any other than nominal damages.

Martin, (Attorney-General,) for the Defendant, cited 3 *Bac. Ab.* tit. *Grant*, (D.) 382. *Walker vs. Constable*, 1 *Bos. & Pull.* 306. *Moses vs. Macferlin*, 2 *Burr.* 1005; and *Esp. N. P.* 101.

Chase, Ch. J. The jury may give what damages they think the plaintiff is justly entitled to as an equivalent for the injury sustained.

The court are of opinion, that it is within the province of the jury to ascertain and fix the quantum of damages, as an equivalent for the use of the negroes, according to what they may think right on consideration of the evidence; and that they are not restrained, by any principle of law operating on this case, from the full exercise of their judgment. The defendant excepted.

It was admitted, and it is to be considered as part of the statement in this cause, on which the court has given its opinions, that *James Russell*, the alleged mortgagee of the defendant, was in the year 1763 a subject of his *Britannic* majesty, residing in *Great Britain*; that in the year 1772 he was in *Maryland* on a visit, and soon returned to *Great Britain*, and continued to reside there from the year 1774 to his death in 1787, a subject of the crown of *Great Britain*; and that on the 4th of July 1776, the then province, now state of *Maryland*, became an independent government, and from that day until the 30th of September 1783, open war existed between this state and the king of *Great Britain*.

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Verdict and judgment for the plaintiff. The defendant appealed to this court, and on the death of the appellee, his executors were made parties.

The questions arising under the *second*, *third*, *sixth*, *seventh*, *eighth*, *ninth* and *tenth* bills of exceptions, were argued before Pole, Buchanan, Nicholson, and Earle, J. by

Martin, for the Appellant; and by
Johnson, (Attorney-General,) for the Appellee.

The Court agreed with the General Court in the opinions expressed in the several bills of exceptions taken on the part of the defendant in that court.

JUDGMENT AFFIRMED.

June.

Hamilton vs. Beall, *et al.*

A H, being entitled to a lot of ground, but ignorant of his right, was induced by the fraud and imposition of the agent of B B, in 1791, to execute a conveyance to B B, for the lot for a small consideration. He filed his bill in chancery in 1798, to have the conveyance vacated, &c. The answers of B B's representative, and the agent, denied all fraud, &c. *Decreed*, that as it does not appear that a fraud was perpetrated, or if it was, that B B was a contriver or privy to, or partaker of it—as the complainant suffered many years to elapse before he filed his bill—as the property hath since been greatly improved and changed, and hath descended on several successive heirs—as the argument from convenience ought always to have influence, the complainant is not entitled to recover. Bill dismissed.

Appeal from the Court of Chancery. The complainant, (now appellant,) by his bill filed on the 20th of April 1798, stated that *George Gordon*, being seized of certain lots in fee in *George-Town*, by his will dated 1766, devised the house and lot No. 48, and the *acre of land* whereon the old warehouses are erected, in fee, to his grandson *George F. Hamilton*, and lot No. 52, with the warehouses thereon, in fee, to his grandson *Charles E. Hamilton*. That after the death of the testator, *George* and *Charles* respectively entered, &c. That they both afterwards went to sea, and died intestate, leaving *Thomas Hamilton* their heir at law. That *Thomas Hamilton*, being seized of the lots devised to *George F. Hamilton*, died in 1783, without having made any valid testamentary disposition of the lots, his will not having been executed in the manner prescribed by law to pass real estate; and having died intestate as to the lots, the same descended to *William Hamilton*, who was his eldest son and heir at law. That *William Hamilton* afterwards died, having made his will in June 1786, by which the lots are not particularly devised, but if they passed by the expression in the will, it was to the complainant, and who was his eldest son and heir at law. That after the death of his father, the com-

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plainant resided in *Monongalia* county, in the commonwealth of *Virginia*, and that in the year 1791, *Brooke Beall*, since deceased, (whose father had intermarried with *Ruth*, one of the daughters of *Thomas Hamilton*,) well knowing the premises, and that for want of a legal execution of the will of *Thomas Hamilton*, the lots were the property of the complainant, and intending to defraud the complainant thereof by untrue and deceitful pretences, fraudulently procured *Andrew Hamilton*, who was named executor in the will of *Thomas Hamilton*, to repair to the complainant in *Virginia*, where he resided, and by deceit and fraud to obtain a legal conveyance from him to *Beall* for the lots; and that *Andrew Hamilton*, acting by the procurement, and by the directions and with the consent and knowledge of *Beall*, falsely and deceitfully alleged and pretended to the complainant, (who was then little more than 21 years of age, and was ignorant and unlettered,) that the will of the complainant's grandfather, *Thomas Hamilton*, was good and valid in law, only that he had not thereby authorised or empowered him, *Andrew*, although appointed his executor, to sell the lots; and *Andrew* further informed the complainant, that he must give him a power of attorney for the purpose of acknowledging a conveyance from the complainant to *Beall* of the lots, which *Andrew* said he had consented to sell to *Beall*, under the will of *Thomas Hamilton*, or that the complainant must go to *Maryland* to execute and acknowledge the same, or that he *(Andrew,)* must apply to the governor and council of *Maryland* for an order to sell the lots, under a late act of assembly of that state, which *Andrew* falsely alleged to have passed, and that the complainant therefore would be obliged to attend at *Annapolis* to make valid the sale. That the complainant, being young and unlettered, and placing confidence and belief in what *Andrew*, in behalf and by the procurement of *Beall*, falsely told him, and fearing that he must either execute a conveyance for the lots, or be subjected to the expense and inconvenience of attending at *Annapolis*, as *Andrew* had falsely and deceitfully told him he must do, and being likewise without money, and his mother then ill in bed, and depending on him for assistance and support, he was induced to execute, and did, on the 7th of February 1791, execute a conveyance to *Beall* for the lots before mentioned, for the trifling consi-

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deration of *three pounds ten shillings* current money, which is all that he received, and which he would by no means have accepted as a consideration for the lots, but for the imposition practised on him as before mentioned. That after the execution of the deed, to wit, in 1793, *Beall* died seized of the lots, and intestate, leaving a widow and seven children, to whom, by law, his real estate equally descended, to wit, &c. the defendants. *Prayer*, that the conveyance may be set aside and rendered null and void, &c. and for further and other relief.

The *answers* of the defendants, (one of them being an infant answered by his guardian for that purpose appointed,) admitting certain facts set forth in the bill, and their ignorance of others, stated, that *Thomas Hamilton*, claiming to be heir at law of *Charles E. Hamilton*, conveyed that part of lot No. 52, which was devised to *Charles* by *Gordon*, to *John Orr*, who afterwards conveyed the same to *Brooke Beall*, the ancestor of the defendants. That after the death of *Thomas Hamilton*, his executor *Andrew Hamilton*, offered to sell to *Brooke Beall* the lots which is the object of the bill of complaint, but on examination it was found that there was a defect in the title, and it was agreed between *Andrew Hamilton* and *Beall*, that if a good and complete title could be procured for the lots, he, *Beall*, would become the purchaser; whereupon *Hamilton* agreed to procure a title, and obtained the deed mentioned in the bill from the complainant to *Beall*, and *Beall* paid to *Hamilton* for the lots £700 or £800. The defendants deny that *Beall* ever did in any manner advise, or through false pretences persuade the complainant to convey the lots, nor do they believe that *Andrew Hamilton* took any undue means to effect that end. They refer to the conveyance, and pray that it may be taken as part of their answer; and *Beall* being a purchaser for a valuable consideration, without fraud, they contend, that neither him, nor his heirs, ought to be disturbed in their rights. That the complainant never did, as they are informed and believe, make any claim to the lots either of *Beall*, in his life-time, or of his heirs since his death, until the present application; and they are ignorant of any fraud ever having been practised on him. That since the purchase, on the faith thereof, *Beall* made valuable improvements, &c. The answer of *Andrew Hamilton*, also one of the defendants,

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stated, among other things material to be noticed, that as executor of *Thomas Hamilton*, not knowing of any defect in the title, he advertised the lot or acre of ground, whereon the old warehouse formerly stood, for sale, and on the 3d of January 1791, exposed the lot at public sale, where there were several bidders, and among others *Brooke Beall*, and it was fairly struck off to him, as the highest bidder, for £225. That after the sale, the title papers were by the defendant put into the hands of *Beall*, to prepare the conveyance. That it was discovered by *Beall* that the will of *Thomas Hamilton* was defective, there not being three witnesses to it, and on that account the legal estate had descended to the complainant, who was the heir at law of *William Hamilton*. That *Beall* refused to pay the purchase money until the title of the complainant could be obtained, either to himself directly, or to some person who would convey to him; that Mr. *Gantt* was consulted as counsel, and he advised the making of a deed to *Beall* directly from the complainant, as the most proper mode of securing the title, and a deed was prepared by Mr. *Gantt*, for which the defendant paid him. The defendant afterwards, in February 1791, went to *Virginia*, where the complainant then resided, and carried with him the deed so prepared, and a copy of the will of *Thomas Hamilton*. That the defendant showed to the complainant the copy of the will, explained to him the defect, and informed him, that it having only two witnesses would not authorise the defendant to make a title to the purchaser, that the will was inoperative as to the land; that *Beall* had become the purchaser, but refused to complete the contract unless the complainant would convey the land. The defendant then showed the deed, so prepared, to the complainant, and asked him if he would execute it. That the complainant, being fully acquainted with the nature of the will, voluntarily, and without any hesitation, agreed to convey his title to the property, and to execute the deed to *Beall*. That the defendant had also a power of attorney prepared to have the deed properly acknowledged by some person in this state; but the complainant informed the defendant, that he wished to make a visit to his uncle *John*, who resided near *Shepherd's* town, and *Allegany* county being on the road, he would, on his way through that county, execute and acknowledge the deed; which was accordingly

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done on the 7th of February 1791. That the complainant and defendant were in company together for several days after the execution of the deed, and conversed respecting it, and the complainant expressed himself satisfied with its execution. When the defendant saw the complainant several years after, he did not express any dissatisfaction at having conveyed the land to *Beall*. The defendant denies that he ever told the complainant that the will of *Thomas Hamilton* was good and valid in law, but on the contrary informed him that it was defective and inoperative to pass land, or give any power or authority to affect the same. He also denies that he ever informed the complainant that he would apply to the governor and council, &c. and denies the other allegations stated in the bill, of fraud, deception, &c.

Testimony was taken under commissions, and the cause having been argued and submitted,

HANSON, Chancellor, (24th September 1803,) stated, that whether he shall decide in favour of the complainant, or in favour of the defendants, the case must, to every candid person, appear hard for the loser, and most probably litigation will be continued as far as possible to the great expense, trouble, and anxiety of both parties.

In various cases of doubt or difficulty, or hardship, the chancellor has thought proper to recommend a compromise and decree by consent, and experience has convinced him that he is right. He considers this case peculiarly proper for a settlement in that way. He has never had before him a case concerning the merits of which he more doubted, and of the event of which, after his decision, doubts might more reasonably be entertained.

Acting on principles which have always governed him, and led by those principles to consult the welfare, as far as his power extends, of every suitor in this court, whose conduct has not, in his opinion, deserved punishment or reprobation, he proposes an adjustment, such as he believes an intelligent, careful, impartial arbitrator would award. Such as cannot be greatly detrimental to the party, who shall be finally victorious, in case this proposal shall be rejected, but which, in such case, will have been beneficial to the other party.

Let the parties, by writing here filed, consent to a decree to the following purport, viz.

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1st. The defendants, heirs of *Brooke Beall*, shall on or before the 25th day of March next, pay or bring into this court, to be paid to the complainant, the sum of 800 dollars; and in case that sum shall not be so paid, or brought in, the payment thereof, with interest, may be enforced by execution on the persons or property of the defendants.

2d. The complainant shall execute and acknowledge, according to law, a release to the defendants of all his right, legal or equitable, to the property in question.

3d. Each party shall bear the proper costs.

This recommendation of the chancellor was not acceded to, and he then passed the following decree:

The defendants having rejected the chancellor's recommendation, it becomes incumbent on him to determine as a judge, wholly in favour of them, or of the complainant, according to the best of his judgment, and knowledge of the principles of this court, and not, as he wishes he were authorised to do, in the spirit of a fair, impartial, intelligent arbitrator.

Under the *special circumstances* of the case he may not speak so largely as it is customary for him to speak in decrees of importance. But he will say thus far—As he is not satisfied that a fraud was perpetrated, or even if it was, that *Beall*, the purchaser, was a contriver, or privy to, or partaker of it; as the complainant suffered many years to elapse before he filed his bill; as the property hath since been greatly improved and changed, and hath devolved on several representatives; as the argument from convenience ought always to have influence, he cannot think the complainant entitled to relief.

It is true that some of those reasons would, if standing alone, be entitled to little or no weight, but when united they appear to form a sufficient and firm prop or support for the defendants.

Were indeed the chancellor fully convinced from the evidence, that, before the complainant executed the deed, there were, between him and *Andrew Hamilton*, transactions which this court must consider as constituting a fraud on the part of *Andrew*, the circumstances herein stated as reasons would not induce the chancellor to refuse relief. Consider too, the rule respecting the refutation of an answer—examine the answer and evidence in this cause together—compare the testimony on each side—consider, as

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we must do, when witnesses differ, whose testimony is most probable—consider even if the complainant's witnesses are correct, and their testimony is to prevail against the answer and opposing testimony, how far ignorance should protect a man in this court. If one party shall tell the other a most improbable story to intimidate—For instance, if A tells B, a plain common farmer or planter in *Virginia*, "if you will not execute this deed, the governor of *Maryland*, in virtue of a law of his state, will send for and compel you." If the farmer be not half an ideot or a lunatic, or in a state of mental imbecility, it must be difficult for even *three* witnesses against a defendant's answer, to satisfy the mind that A's declaration has induced the farmer to make the conveyance. The testimony of those who swear to *Andrew Hamilton's* declarations must be unsatisfactory; their memories must be defective; if not, it may be demanded, wherefore did they stand by and permit the falsehood to have its effect?

If ignorance were by this court protected to that extent, how many fair contracts might be set aside! Ignorance indeed, real or pretended, might in many instances have the advantage of knowledge and wisdom. In the chancellor's opinion, on a view and comparison of all the proofs, there has not in this case been that *suggestio falsi, aut suppressio veri*, which can authorise him to grant the relief prayed by the grantor in the deed against fair purchasers, who have long been in possession of, and improved the property, before a demand of any kind made of or against them. *Decreed*, that the bill be *dismissed*, but as the complainant had probable grounds for instituting the suit, it is dismissed without costs. From this decree the complainant appealed to this court.

The cause was argued before Chase, Ch. J. Polk, Buchanan, Nicholson, and Earle, J.

Johnson, (Attorney General,) and *Magruder*, for the Appellant, cited 1 *Fonbl.* 189. 1 *Pow. on Cont.* 140, 144. *Broderick vs. Broderick*, 1 *P. Wms.* 239. 2 *Pow. on Cont.* 156. *Evans vs. Llewellin*, 2 *Bro. Chan. Ca.* 150. *Brogden vs. Walker's Ex'r. &c. (ante* 285.) 2 *Fonbl.* 158. *Jennings vs. Moore*, 2 *Vern.* 609. *Blenkarne vs. Jennings*, 1 *Bro. Parl. Ca.* 244; and *Doe vs. Martin*, 4 *T. R.* 66.

Martin and *Shaaff*, for the Appellees, cited 1 *Fonbl.* 115, 189, *(note,)* 384; and *Pasley vs. Freeman*, 3 *T. R.* 51.

DECREE AFFIRMED.

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Reinicker vs. Smith.

JUNE

REINICKER vs. SMITH.

SMITH vs. REINICKER.

CROSS APPEALS from a decree of the Court of Chancery. The complainant, *(Reinicker,)* filed his bill of complaint against the defendant, *(Smith,)* stating that *Thomas Franklin*, being seized of a lot of ground in *Baltimore*, agreed to sell all his interest therein to the complainant for the consideration of £112 10 0, which agreement was reduced to writing, and is evidenced, by the bond of conveyance exhibited, dated the 20th of March 1794. That the consideration money has been fully paid. The bill further stated, that *Benjamin Franklin*, brother of *Thomas*, afterwards claiming to be possessed of an interest in the premises, agreed to transfer and convey the same, absolutely, to the complainant, for the consideration of $800, which agreement was reduced into writing, and is evidenced by the bond of conveyance, exhibited, dated the 29th of July 1794. That the consideration money has been fully paid; and the complainant, ever since the execution of the two bonds of conveyance, has been in the quiet, secure, and unmolested enjoyment of the premises. That *Thomas* and *Benjamin Franklin* are both since dead, and that *Sarah Smith*, the defendant, is seized and possessed of the inheritance and legal estate in the premises, by right of descent, and as heiress at law. That the complainant has frequently applied to her for a deed of conveyance of the premises, which she has refused to execute, and has instituted actions of ejectment for the recovery of the possession of the premises. *Prayer* for a specific performance of the agreements, and a deed of conveyance of the premises, and for an *injunction*, &c. The *answer* of the defendant stated, that her brother, *James Franklin*, was in his lifetime seized and possessed, and died seized and possessed, amongst other real estate, of the lot of ground mentioned in the bill, on the 31st of December 1795, intestate, leaving a sister, (the defendant,) and two brothers, *Thomas* and *Benjamin*, before named, and which two brothers, and the defendant, on the death of *James*, became, under the act to direct

T F. and B F, being seized as tenants in common under the act to direct descents, with S S. of and in (among others,) a lot of ground, contracted separately with G R, and agreed to convey to him all their interest therein, on the payment to each of them of $300; and the money being paid, possession of the lot was delivered to G R, who after the death of T and B F, filed a bill in chancery against S S, she being their heir, for a specific performance of the contract. S S, by her answer, alleged that both T & B F were in habits of intemperance, and were almost constantly in a state of intoxication. That the lot was contracted to be sold by them when in a state of intoxication, or when they were incapable of transacting business, at a price greatly below its value, &c. —*Decreed*, that S S convey to G R, one undivided third part of the lot of ground; but as to the contract of B F, on account of the satisfactory proof of his imbecility, it ought not to be enforced; and that G R deliver to, or permit S S to take or enjoy two undivided third parts of the lot of ground, without her refunding the consideration paid by him to B F

A tenant in common, under the act to direct descents, may dispose of his interest in any particular portion of the estate so held in common

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descents, entitled equally to all the real estate of which *James* died seized, subject to the provisions and regulations mentioned in that act. That both her said brothers were in the habits of drinking strong liquor to great excess; and from the time of the death of their brother *James*, being freed from all restraint, and having entirely in their power the means of gratification, and being, it is believed, encouraged in their excesses by persons who wished to obtain advantages over them, they were almost constantly in a state of intoxication; and that when not actually drunk, they were scarce ever, if ever, free from the effects of the excesses to which they were addicted, and the mental imbecility arising therefrom. That their extreme fondness for strong liquor, and their anxiety to obtain it, also rendered them open to imposition from any person who would furnish them with money by which they could procure their gratification, however exorbitant the terms; and whatever contract they, or either of them, might have entered into for the sale of lands, it is believed, originated either from their being in a state of intoxication at the time, or from the solicitude of acquiring money for their excesses, as they had no occasion to dispose of any of their real estate to supply any necessary want. That both her brothers died within eight months after the death of their brother *James*, and within eleven days of each other, having fallen victims to their constant intoxication. That *Benjamin* died on the 10th, and *Thomas* on the 20th of August, 1794. That the lot of ground mentioned in the bill, is situate in a very valuable and improving part of *Baltimore* town, and contains an acre of ground, and is believed, by the best judges, to be worth upwards of £2000. That *Reinicker* pretends to have the bonds of conveyance set forth, but they are not admitted to have been executed by her brothers, or either of them, or that they received the alleged consideration; but if the bonds were executed, she has no doubt but they were executed by her brothers when in a state of intoxication, or when they were incapable of transacting business, and that advantage was also taken of their ignorance of the value of the property; for the money alleged to have been paid for the property is not equal to the sixth part of the value of the lot. She admits that she has refused to convey the lot to *Reinicker*, because she was and is of opi-

tion, that she is not bound in law or equity to convey the same. That she is willing, and has offered to pay to him any sum of money which her brother *Thomas* hath actually received from him.

Testimony was taken and returned under a commission which issued, and the case was argued before, and submitted to, the chancellor.

Hanson, Chancellor. The complainant applies for the performance of a contract made by a brother of the defendant, who has refused on the ground of the complainant's having taken advantage of a man whom habitual intoxication had rendered unfit to manage his own affairs, and an easy prey to an artful designing man.

The chancellor conceives that the privileges of drunkenness are pretty well ascertained, and that they ought not to be extended. Has it ever been settled or understood, that because a man is addicted to strong drink, no contract which he makes shall be binding, unless he, or those who come after him, shall think it eligible to abide by the bargain? If this were the case, a drunkard would have advantages far superior to those which are enjoyed by the most prudent, shrewd, sagacious man. For instance, seven years ago he sold land for £5 an acre, which in the opinion of witnesses was at that time worth £7. It is now worth £20. He has not conveyed it. Being sued in chancery, he says "it is well known that I was every day drunk, and therefore the contract ought not to stand." The chancellor, as he has already said, considers the privilege to be well ascertained, and sufficiently extensive. If a man evidently has procured another to be intoxicated, in order that he might obtain an unconscionable bargain of him, and has obtained it, this court will not, on application, hesitate to vacate the contract. But if a man, accustomed to strong drink, and even to be intoxicated every day, but notwithstanding possessed of reason, and the power of reflection, determines, with all the deliberation he is capable of, to sell his property, offers it repeatedly for sale, at length sells it at the best price he can obtain, to a man, against whom there is not proof of his having taken advantage of the hour of intoxication; if afterwards he professes himself satisfied with the bargain, and assigns a good reason for it—when the bargain is clear, explicit and certain—when it

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has been fully executed on the other side—the chancellor cannot think, that under such circumstances this court ought not to enforce it. He has described the case before him with respect to *Thomas Franklin*, as appears to him from the proceedings. *Decreed*, that the defendant, by a good deed, to be acknowledged and recorded according to law, give, &c. to the complainant, and his heirs, one undivided third part of the lot or ground mentioned in the bill, and the bonds from *Thomas* and *Benjamin Franklin*, deceased, to the complainant.

As to the contract of *Benjamin Franklin*, the chancellor is of opinion, that on account of the satisfactory proof of his imbecility, it ought not to be enforced by this court; but that the money to him paid by the complainant ought to be restored. *Decreed* also, that the defendant pay to the complainant the sum of $300, which was, it appears, paid by the complainant to *Benjamin Franklin*, deceased; and that upon her executing and acknowledging the deed hereby directed, and paying to the complainant, or bringing into this court, to be paid to him, the sum of $300, the injunction in this cause issued be dissolved; and that the complainant be enjoined to, and shall deliver to her, or permit her to take or enjoy, two undivided third parts of the lot or ground before mentioned. From this decree both the complainant and defendant appealed to this court.

The cause was argued before Chase, Ch. J. Polk, Buchanan, Nicholson, and Earle, J. by

Key and *T. Buchanan*, for *Reinicker*; and by
Martin and *Harper*, for *Smith*.

The counsel for *Smith* contended, that the contracts ought not to be decreed to be specifically performed, because of *drunkenness*, and the *inadequacy of price*. As to the first, they cited 2 *Pow. on Cont.* 226, 227. *Osmond vs. Fitzroy*, 3 *P. Wms.* 131. *(note* A.) *Cory vs. Cory*, 1 *Ves.* 19. 1 *Fonbl.* 68. And as to the latter, they cited 2 *Pow. on Cont.* 78, 153, 158, 221, 224, 225, 227. *Chesterfield vs. Janssen*, 2 *Ves.* 155. *Pope vs. Roots*, 7 *Bro. Parl. Ca.* 184. *Clarkson vs. Hanway*, 2 *P. Wms.* 203. *Cole vs. Gibbons*, 3 *P. Wms.* 293. *Baldwin vs. Rochford*, 1 *Wils.* 229. *Attorney General vs. Syderfin*, 1 *Vernon*, 224. *Green vs. Wood*, 2 *Vernon*, 632, and *Phil-*

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lips vs. Buck, 1 *Vernon*, 227. They also contended, that a tenant in common could not convey less than his *whole interest* in the *whole estate* which descends to him under the act to direct descents, (1786, *ch.* 45,) as under that act the whole estate is to be divided; and if the interest of a tenant in common, in a particular lot of ground of that estate, has been sold by him, the division could not be made; for it might be that where there were several lots, upon the division and allotment, the particular lot which had been so sold might be assigned to some other of the heirs.

The counsel for *Reinicker* cited 2 *Pow. on Cont.* 152 to 159, 144 to 145, 220, 228. 1 *Pow. on Cont.* 30. *Sugdon* 167. They also argued, that it could not be said that a tenant, holding, in common with others, property in different parts of the state, could not sell his interest in any one of the parcels lying in any particular place. That he might sell his whole interest in the estate, or his interest in a part only. That he might convey his interest in a particular designated property; and if he could convey, he could contract. He could not designate a particular part of the lot or tract of land, but he might sell his interest in any particular part. There could be no difficulty under the act to direct descents, where a partition or sale of the estate was directed. The purchaser could be admitted to participate, and might be placed in the situation of the tenant who sold to him. That if a judgment was rendered against a tenant in common, it would not be contended that a *fieri facias* could not be laid upon his interest in a particular part of the estate, and that interest sold.

The Court *affirmed* that part of the decree of the court of chancery from which *Reinicker* appealed, with costs. And on the appeal by Mrs. *Smith*, the court *reversed* that part of the decree which decreed that she should pay to *Reinicker* $300, without costs in either the court of chancery or this court; and they decreed, that on her executing the deed directed, the injunction should be dissolved, and that *Reinicker* be enjoined to, and should deliver to her, or permit her to take or enjoy, two undivided third parts of the lot of ground mentioned in the proceedings.

DECREE REVERSED IN PART.

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JUNE.

Burk
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The State

BURK vs. THE STATE.

An indictment containing two counts, one charging *felony*, and the other a *misdemeanor*, was held to be good

After a prisoner has pleaded generally to an indictment, having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other

When nine jurors are sworn in a criminal case, and the rest of the original pannel is exhausted by peremptory challenges, the court can legally award an order for the summoning only three talesmen, and when eleven are sworn, to summon but one.

As to the manner of awarding a *venire* for summoning talesmen in criminal cases, capital.

As to the joinder of offences in criminal cases, and the joinder of causes of actions in civil cases.

ERROR to *Washington* county court. An indictment, containing two counts, one for a rape committed on the body of *Catharine Maria Brawner*, and the other for an assault, with intent to commit a rape, on the same person, was found in the county court of *Fredetick* against the plaintiff in error, at February term 1809, and removed, on his suggestion and affidavit, by the transmission of a *transcript* of the record to *Washington* county court. The nature of the indictment, and the facts upon which the questions of law were raised, sufficiently appear in the opinion of the court below, delivered by

BUCHANAN, Ch. J. This case now stands on a motion in arrest of judgment. The indictment contains two counts —the first charging a *rape*, and the other an *assault with intent to commit a rape.*

The prisoner was arraigned upon the whole indictment, and pleaded generally, not guilty. The attorney for the state then elected to proceed against him on the *first count* in the indictment, and the jury were accordingly sworn, and charged upon the *first count* alone, and found him guilty of the offence therein alleged, particularly confining their verdict, by the expressions of it, to the *first count;* on the *second count* no verdict was given.

Fifteen of the jurors returned were peremptorily challenged by the prisoner when put upon his trial, and nine sworn, which exhausted the original pannel. On motion of the attorney for the state, an order to the sheriff to summon three talesmen, was awarded by the court, two of whom were sworn, and one challenged. An order to summon one talesman was then awarded on the application of the attorney for the state, and the person summoned, sworn, which made up the legal number of twelve sworn on the jury.

There are three questions for the consideration of the court, growing out of the indictment and proceedings thereon, and the reasons assigned in arrest of judgment.

First. Whether the indictment, containing two counts, one charging a *felony*, and the other a *misdemeanor*, is radically bad?

Secondly. Whether, after the party had pleaded generally to the indictment, the jury were legally sworn and

charged upon one of the counts only to the exclusion of the other. And

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Thirdly. Whether, when nine jurors were sworn, and the rest of the original pannel exhausted by peremptory challenges, the court could legally award an order to the sheriff to summon only three talesmen; and again, when eleven were sworn, to summon but one?

In the examination of these questions, the order in which they are stated will be inverted; and the manner of supplying the jurors by talesmen, be first considered.

It cannot be doubted, that in this state, a *tales de circumstantibus* may be awarded in capital cases; such is the uniform practice, and such are the provisions of the statute of 35 *Henry VIII. ch.* 6. But it is contended that as three were wanted in the first instance to supply the deficiency, and, as the prisoner, (having challenged only fifteen,) was entitled to five more peremptory challenges, a less number than eight could not be applied for by the prosecutor, or awarded by the court. And the same ground is taken against the second order. But this idea is unsupported by authority. Several authorities have indeed been cited and relied on in aid of the objection made to the number of talesmen awarded, which, when examined, only go to show, that courts may, if they please, to prevent the delay that might be occasioned by the defendant's challenges, award a greater number than was on the original pannel; and this is admitted. But no case has been cited, or authority referred to, which denies the power of courts to award only so many talesmen, as would, with those sworn, make up the number of twelve; or in support of the position, that a less number cannot be awarded than would be sufficient to make up the deficiency, after the defendant has gone through with his challenges; or in other words, that as the number deficient, and the remaining peremptory challenges to which the party was entitled, amounted together to eight, not less than eight could legally have been awarded in the first instance. Nor is the idea strengthened by the reason of the case, for if so many must always be awarded as will leave a sufficient number to supply the deficiency, after the defendant has completed his challenges, it would be impossible to ascertain the number proper to be summoned; for besides peremptory challenges, a prisoner is entitled to challenges for

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cause, without number. And it is not to supply deficiencies occasioned by peremptory challenges only, that talesmen are awarded; but deficiencies, occasioned in criminal trials by any other cause, must be made up by talesmen as in civil cases, in which peremptory challenges are not allowed.

There is no principle laid down more broadly in the books, than that the award of talesmen must be repeated until the legal number of twelve is completed, the subsequent tales being always for a less number than the former; and this precludes the idea that the award must always, in the first instance, be of so many as to leave enough to supply the deficiency, after the party has completed his challenges; for in that case, there could never be a second tales ordered. It is true that in capital cases, courts may, if they please, award an order to the sheriff to summon more than the precise number necessary to supply the deficiency, though there is no obligation on them to do so; and if, in this case, the prisoner, or his counsel, had requested a greater number to be summoned, he would have been gratified. But an order for three only in the first instance, and one in the second, was prayed by the attorney for the state, and each prayer and order acquiesced in at the time by the counsel for the accused. The second tales was for a less number than the first, and each was for the precise number necessary, with those sworn, to make up the legal number of twelve, and in strictness of law, that is all that is required in such case; and as far as this court are informed, is in strict conformity with the practice throughout the state.

The second question, "whether, after the prisoner had pleaded generally to the indictment, the jury were legally sworn and charged on one of the counts only?" is fully resolved in *Young vs. The King*, 3 *T. R.* 106; in which it is said, "that if an indictment contains several counts for separate offences, the court may quash it before the party has pleaded, or the jury are charged; but if it should not be discovered until after the defendant has pleaded, or the jury are charged, the judge may put the prosecutor to elect on which charge he will proceed."

That case goes much farther than the present, for in that it is laid down, that not only after the party has pleaded generally to the indictment, but after the jury are sworn upon the whole issue, for they are never charged be-

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fore they are sworn, the court may make the prosecutor elect on which count he will proceed, and in this case though the attorney for the state did not elect to proceed on the first count alone, until after the prisoner had pleaded, yet it was done before the jury were either charged or sworn; and if the position taken in the case referred to is tenable, the proceedings on that part of the case before the court are correct.

The next and only question remaining to be considered, is, "whether the indictment containing two counts, one charging a *felony* and the other a *misdemeanor*, is substantially vicious," as is contended for on the part of the prisoner?

The exception taken to the indictment is attempted to be supported by assimilating the proceedings in criminal trials, to those in civil cases, which is not correct to the extent contended for.

If entire damages be assessed on a declaration containing several counts, any one of which is bad, it is error; but there is no principle better established, than that if a general verdict of guilty to be found on an indictment containing several counts, it is sufficient, if one is good, although all the rest are bad.

It is objected, that a *felony* and a *misdemeanor* can no more be charged in the same indictment than assumpsit and tort can be joined in the same declaration. But the reasons given in the books, why certain different causes of action may not be joined in the same declaration are, that the process is different; that they do not admit of the same general plea, and are not followed by the same judgment. And here again the analogy, contended for between the proceedings in criminal and civil cases, does not hold; for it has been long settled, that an indictment may charge several felonies of different grades, and requiring different legal judgments, as offences clergyable, and offences not clergyable, such as murder and manslaughter, burglary and larceny, &c. and that the party may be acquitted of one of the offences charged, and convicted of the other, and receive judgment accordingly; and if so, there is no substantial reason why a rape, and an assault with intent to commit a rape, may not be charged in the same indictment; for, leaving the act of 1793 out of consideration, the legal judgments required on two such counts are not more dissimilar, than on two counts, one charging burglary and

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the other larceny, &c. And it is laid down in *Brown vs. Dickson*, 1 *T. R.* 276, and in *Dickon vs. Clifton*, 2 *Wilson*, 319, and others, that whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration.

Now apply that rule to the indictment in this case, and the objection falls; for in this state the legal process on each of the offences charged is the same; they admit of the same general plea, and by the act of assembly 1793, *ch.* 57, *sect.* 10, the same judgment may be pronounced.

It has been further urged, that a felony and a misdemeanor cannot be laid in the same indictment, because they require different modes of trial; on one charge the party accused having a right of challenge, and on the other not; and also being subject to arraignment on one, and not on the other. But neither the arraigning a man on an indictment for a misdemeanor, nor indulging him in a peremptory challenge, is error after verdict.

That objection, therefore, fails in reason, as it relates to the misdemeanor, nor does it appear to have any more weight as it applies to the charge of felony; for the party accused having no right to peremptory challenges on the count for misdemeanor, could not, by the addition of that count, be in any manner prejudiced in his challenges, or otherwise, on the count for felony, before the act of 1802, *ch.* 69.

It is true, that in this state, under that act of assembly, a party, indicted for a misdemeanor, is entitled to a pannel of twenty jurors, four of whom he may strike out: but that affords no stronger argument against the uniting a felony and a misdemeanor in the same indictment, than the right which every one, charged with a capital offence, has to twenty peremptory challenges, does to the joining several capital felonies in the same indictment; and it is a settled principle, that different *felonies* may be charged in the same indictment, and though they might confound the prisoner in his defence, or prejudice him in his challenges; for he might have reason to object to a juryman's trying him on one of the counts, whom he would wish to be sworn on the others; yet it is no objection to the indictment after verdict. Why then should the addition of a count for a misdemeanor vitiate an indictment charging a felony? But to prevent prejudice to prisoners in their challenges,

and confusion in their defence, courts may, and perhaps ought, before the jury are charged, to quash indictments containing separate and distinct felonies, or to make the prosecutor elect on which count he will proceed; so for the same reason, and particularly since the act of 1802, *ch.* 69, there would be a propriety in pursuing the same rule in relation to indictments charging a felony and misdemeanor.

If, as it is alleged, no case of an indictment charging a felony and a misdemeanor, is to be found in the books, it affords no argument against the correctness of such an indictment; the case may never have arisen, or the principle may never have been questioned, and therefore not reported.

And if this is a question of first impression, it must be decided on principles of analogy to other cases; and thus tested, the indictment does not appear to be defective; not on account of the modes of trial in cases of felony and misdemeanor being different, for it is no objection, after verdict, that a traverser on an indictment for a misdemeanor was arraigned, or indulged with a peremptory challenge.

In 2 *East's Crown Law*, 1023 and 1029, 2 *Hawkins's Pleas of the Crown*, 625, and *Kelyng's Reports*, 29, it is laid down as settled law, that if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant found guilty generally, and afterwards the court should be of opinion that the fact does not amount to felony, but only to a trespass, judgment may be given as for a trespass only.

In such a case, the party accused would be arraigned, and have his challenge, and yet the offence contained in the indictment only a trespass or misdemeanor, though charged as a felony; and the principles so established, may perhaps be applied with force to the present question in all its parts; for if a misdemeanor may be charged as a felony, and punished as a misdemeanor, why may not a felony and a misdemeanor be laid in the same indictment, and the party be acquitted of the felony, and found guilty of the misdemeanor, or *e converso*? Not on account of the party being liable to be prejudiced in his challenges, or the jury perplexed in the application of the testimony; for the same objection might be urged, and with more

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force, to an indictment charging separate and distinct felonies; and yet such indictments are held to be good, and not because the different counts would require different legal judgments; for different *felonies* may be laid in the same indictment, which are differently punished, and require different legal judgments, such as murder and manslaughter, burglary, and larceny, &c. Moreover, an indictment charging a rape, and an assault with an intent to commit a rape, is less objectionable here than in *England*; for in this state, under the act of 1793, *ch. 57, s. 10*, a conviction of either offence may be followed by the same legal judgment.

In this particular case the two offences charged in the indictment are connected together, and the misdemeanor merged in the felony. No evidence could have been admissible on one count, that was not applicable to the other, which guards it against the objection, that the jury might be confused in the application of testimony of a different nature, and goes to show the compatibility of the two counts; or, if the misdemeanor is to be considered as a separate and distinct offence, committed at a different time, and not a constituent part of the felony charged, it does not alter the case.

The great strictness observed in criminal prosecutions, grows out of the benevolent principle, that every prisoner should have a fair and impartial trial; and this the prisoner in the present case has had.

The attorney for the state, as he had a right to do, abandoned the second count, and elected to proceed on the first, upon which the jury were accordingly sworn and charged. There was no application to quash the indictment, nor any objection made at the trial, to the form of proceeding; but the prisoner chose to take his chance before the jury on the charge of felony, to which the trial was exclusively confined. He was not, nor could he, in any manner have been prejudiced by the addition of the second count, which being abandoned before the jury were sworn, stood as inoperative as if the grand jury had found the indictment a true bill as to the first count, and indorsed *ignoramus* on the second; which they might have done, and the indictment have been good as to the count found a true bill. He had, under this mode of proceeding, every privilege and advantage which he could have had if

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the indictment had contained only the count on which he was tried; and now to arrest the judgment would be a perversion of justice.

Upon the whole, in the opinion of the court, the reasons assigned in arrest of judgment are unsupported.

Judgment was entered on the verdict, sentencing the prisoner to be hung, &c. Sentence of death was pronounced by the chief judge; and afterwards the prisoner removed the indictment and proceedings to this court by a writ of error.

The cause was argued before CHASE, Ch. J. POLK, NICHOLSON, and EARLE, J.

Martin, *Taney*, and *Lawrence*, for the Plaintiff in error, raised the same objections which were urged in the court below on the motion in arrest of judgment.

On the *first objection* they contended, that felony and misdemeanor were different offences, and ought not to be found in the same indictment. That under those counts, different modes of trial were required. The prisoner must be arraigned in the first, and not in the other; he must be present at the trial of one, and he need not be at the trial of the other. Judgment might be passed against him on one, when he was not present; but in the other, it could not be done except he was present. In the one, he might challenge peremptorily to the number of 20 jurors; but in the other, he had no such right. In the last, he might strike out four from the pannel of jurors, and so might the attorney for the state; but in the former, the attorney for the state could not challenge or strike out from the pannel. That the judgments were different; in one, the life of the party might be in jeopardy; in the other, it would not be. That the *benefit of clergy* might be demanded in the one, and not in the other. They cited 4 *Bl. Com.* 216, 375. 2 *Hale's P. C.* 173. 2 *Hawk.* 29, *ch.* 25, *s.* 59. *Crown C. C.* 111. *Brown vs. Dickson*, 1 *T. R.* 276, *The King vs. Roberts*, *Carthew*, 226. *Rogers vs. Cook*, *Ibid* 235 *Young vs. The King*, 3 *T. R.* 98, *per* Lord *Kenyon*, on the fourth objection. 1 *Bac. Ab.* tit. *Actions in General*, (C.) *Dalston vs. Janson*, 1 *Ld. Raym.* 58. S. C. 1 *Salk.* 10. *Courtney vs. Collet*, 1 *Ld. Raym.* 272. *Howard vs. Bankes*, 2 *Burr.* 1114. *Gilb. Hist. C. P.* 6. *The King vs. Higgins*,

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1 *Ventris*, 366. *Mast vs. Goodson*, 3 *Wils.* 354. *Dickon vs. Clifton*, 2 *Wils.* 319. *Swithin vs. Vincent*, *Ibid* 227. *Bage vs. Bromwell*, 3 *Lev.* 99. 2 *Hawk. ch.* 25, *s* 46, 97. *Rex vs. Wilkes*, 4 *Burr.* 2527. *Rex vs. Pewtress*, 2 *Stra.* 1026. *Hardw.* 203. *The King vs. Stratton*, *Dougl.* 240, 241. *Rex vs. Fieldhouse*, *Cowp.* 325. *The King vs. Wheatley*, 1 *W. Blk. Rep.* 275. *The King vs. Clendon*, 2 *Ld. Raym.* 1572. S. C. 2 *Stra.* 870. *Rex vs Benfield*, 2 *Burr.* 980, 984. *The King vs. Sidley*, 1 *Siderf.* 168. 2 *Hawk. ch.* 25, *s.* 62. *The State vs. Ringgold*, (in the general court, April term, 1792.) *Rex vs. Cross*, 1 *Ld. Raym.* 711. 2 *Hale*, 172. *Rex vs. Westbeer*, 2 *Stra.* 1133. *Leach C. L.* 15. 2 *East's C. L.* 1023, 1028, 1031. 4 *Blk. Com.* 221. *Martyn Page's* case, *Cro. Car.* 332. As to the right and nature of the *benefit of clergy*, they cited 2 *Hawk. ch.* 33, *s.* 20, 23, 25, 112, 114, 115, 121, 128, 129, 132. *Stat.* 1 *Edw.* VI. *ch.* 14, *s.* 5. *Stat.* 5 *Ann*, *ch.* 6. 4 *Hen.* VII, *ch.* 13. 2 *Harr. Ent.* 52. *Cuddington vs. Wilkins*, *Hob.* 67, 81. *Searle vs. Williams*, *Ibid* 294. 5 *State Trials*, 168. *Leach C. L.* 360. 2 *Hawk. ch.* 36, *s.* 1, 10, 14. *Hale*, 220, 251; and 2 *Hawk. ch.* 47, *s.* 6.

On the *second objection* they contended, that the counsel for the state could not elect on what count he would prosecute; but he must prosecute on the case before the court. They cited 4 *Blk. Com.* 339, 375. 2 *Hawk.* 59, *ch.* 25, *s.* 97. *Rochel vs. Stedle*, *Hardres' Rep.* 166. 1 *Blk. Com.* 142. *Rosse's* case, 3 *Leon.* 83. 2 *Roll. Ab.* 722, *pl.* 19. *Graves vs. Morley*, 3 *Lev.* 55. 1 *Inst.* 227. *Hooper vs. Shepherd*, 2 *Stra.* 1089. *Rex vs. Pewtress*, *Ibid* 1026. *Gildart vs. Rogers*, (in the general court, October term, 1786.) *Young vs. The King*, 3 *T. R.* 106, *per Buller*, J. 2 *Hawk. ch.* 27, *s.* 92. *Fitz. Ab.* tit. *Discontinuance*, 14, 35. *Bro. Ab.* tit. *Discontinuance of Process*, 62, pl. 55. *Clerke vs. Clerke*, *Cro. Eliz.* 622. *Sampson vs. Tothil, et al.* 1 *Siderf.* 325. 2 *Hawk. ch.* 38, *s.* 3. *Coke's Ent.* 57, 372, 379, 381, 385, 387, 390. *Rast.* 43, 412. *Rex vs. Boyce*, 4 *Burr.* 2084, 2085. *Tremaine*, 287. *The King vs. Dowlin*, 5 *T. R.* 311. *Foster's* case, 9 *Coke*, 63. 2 *Hawk. ch.* 47, *s.* 5, 6, 8, 9, 11, 14; and *Fulmerston vs. Steward*, *Plow.* 109.

On the *third objection*, as to the *tales*, they cited *Verni, qui tam vs.* ——, 1 *Lev.* 223. *The Queen vs. Banks*, 6 *Mod.* 246. *Gree vs. Sharp*, *Ibid* 265. 2 *Hawk. ch.* 41,

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s. 12. *Denbawd's* case, 10 *Coke*, 105. *Bro. Ab.* tit. *Octo Tales*, 6, 7, 8, 11, 15, 16, 19. *Vin. Ab.* tit. *Trial*, 321. 2 *Hawk. ch.* 41, *s.* 12, 13. 2 *Hale*, 266. *United States vs. Burr*, 1 *Burr's Trial*, 420. *God.* 204. *The State vs. Orndorff*, (in the general court, October term, 1783.) *Hulton vs. Hun*, *Cro. Eliz.* 849, 850. *The Queen vs. The Inhabitants of Stretford*, 2 *Ld. Raym.* 1170. *The King vs. Wheatley*, 1 *W. Blk. Rep.* 275. 2 *Hawk. ch.* 27, *s.* 105. *Ibid ch.* 25, *s.* 97; and *Rex vs. Wilkes*, 4 *Burr.* 2527.

Johnson, (Attorney General,) contra, on the *first objection*, cited *Young vs. The King*, 3 *T. R.* 98. *Holmes's* Case, *Cro. Car.* 376. S. C. Sir *Wm. Jones*, 351. *The King vs. Joiner*, *Kelyng's Rep.* 29. The act of 1793, *ch.* 57, *s.* 10. *Brown vs. Dickson*, 1 *T. R.* 266. *Dickon vs. Clifton*, 2 *Wils.* 319. 2 *East's C. L.* 1023, 1029; and 2 *Hawk.* 525.

On the *second objection*—*Rex vs. Benfield*, 2 *Burr.* 980; and *Young vs. The King*, 3 *T. R.* 106.

On the *third objection*—The *Stat.* 35 *Hen.* VIII. *ch.* 8. *Denbawd's* case, 10 *Coke*, 103. The act of 1798, *ch.* 94; and 4 *Blk. Com.* 354.

JUDGMENT AFFIRMED.

NORFOLK'S EX'R. *de son tort*, vs. GANTT.

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On the death of a defendant in an action of debt, &c. a summons may issue to an executor *de son tort*, (there being no legal executor or administrator of the deceased,) to appear to and defend the action.

Where an executor *de son tort*, being summoned, appeared to an action of debt brought against the deceased, and confessed the action, and admitted the debt was due to the plaintiff; an auditor was then appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c accordingly. This appointment of auditor was afterwards stricken out by the county court, and a judgment was rendered on the confession above mentioned, for the debt and costs, *de bonis testatoris, si non de bonis propriis* as to costs. *Error* being brought, the judgment was *reversed* by the court of appeals.

ERROR to *Calvert* County Court. An action of *debt* was brought on a *single bill*, by the defendant in error, against *James Norfolk* in his life-time, to which he appeared and pleaded *payment*. His death was afterwards suggested, and a summons issued for the plaintiff in error, as executor *de son tort*, to appear and defend the action, who being summoned, appeared, and afterwards confessed the action, and that the debt demanded was due to the defendant in error, together with a sum as damages and costs. Upon which an *auditor* was appointed to ascertain the sum for which judgment should be rendered, according to the act of 1798, *ch.* 101, *sub ch.* 8, *s.* 9. The auditor reported, that it did not appear by the records of the orphans court of the county that any administration had been granted on the estate of the deceased, so that he

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could not say what assets, if any, were in the hands of the plaintiff in error. The record states, that the auditor, who had been appointed, on refusing to act, was ordered to be struck out, and another person was appointed in his place. After which, on motion of the defendant in error, it was ordered by the court, that the appointment of auditor so made be struck out, and on his prayer that the court would "enter judgment on the confession" of the plaintiff in error, "so as aforesaid made in the plea aforesaid," the court entered judgment against the plaintiff in error, for the debt and damages and costs, *de bonis testatoris, si non de bonis propriis* as to the costs. To reverse which judgment the present writ of error was brought.

The cause was argued at June term 1808, before TILGHMAN, POLK, and BUCHANAN, J. and was reargued at the present term before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, J.

Key, and *Johnson* (Attorney General,) for the plaintiff in error, contended that there was no privity in law or otherwise between an executor *de son tort*, and the deceased, and he could not regularly be summoned and made a party. The act of 1785, *ch.* 80, does not justify it. An executor *de son tort* can only be resorted to by an original action against him. There can be no judgment against him but of assets proved to have come to his hands. The act of 1798, *ch.* 101, directing the appointment of an auditor, does not take in the case of an executor *de son tort*. It only relates to cases where letters testamentary or of administration have legitimately issued. It is by no means clear, that confession of judgment by an executor *de son tort* would be correct, if he admitted assets, provided the action was not originally brought against him. The court could not give judgment for a portion of the assets against such an executor. Here the court entered judgment for the debt and damages confessed, and costs, to be levied of the goods of the deceased, if the executor *de son tort* had so much in his hands; and if not, then the costs to be levied of the goods of the executor. This is not a legal and correct judgment. A judgment against a wrongful executor should be *de bonis propriis* for the amount of assets charged and proved in his hands, but there can be no judgment against him of assets *quando acciderint*, as

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against a rightful executor. Upon the death of *James Norfolk*, instead of making the executor *de son tort* a party, he should have been proceeded against by a new action. Under the act of 1785, *ch.* 80. an executor *de son tort*, not being a representative of the deceased, there could be no continuity of the proceedings against him; and that act never meant to embrace a wrong doer; it intended to provide only for the legal party being made plaintiff or defendant in place of the deceased. The making an executor *de son tort* a party, may be likened to the case of an ejectment where the defendant dies, and a person enters into possession who has no right; and it will not be contended that such person could be made a party in the place of the deceased defendant? There may be a rightful and wrongful executor of the same person. Does the act of assembly contemplate that the wrongful executor may be made a party, and not the proper executor? Suppose, after the death of *James Norfolk*, three persons had each taken a horse, the property of the deceased, could all three be brought into court, and be made defendants in the place of the deceased? Though each might take a horse, yet they were not bound for each other. There can be no hardship in this case, as the plaintiff below might have administered on the estate of the deceased, if there was no legal administration. The judgment is manifestly erroneous; and if the executor *de son tort* could be made a party under the act of 1785, the judgment should have been *de bonis propriis*, and not *quando acciderint*. The court below entered the judgment, although the executor *de son tort* did not confess that he had assets. He only confessed the sum due, and did not admit that he had assets. The act of 1798, *ch.* 101, was made a pretext for the appointment of an auditor, although that act was made to protect rightful executors, so that the assets might be apportioned. The court nevertheless struck out their appointment of an auditor, and entered judgment upon the confession. An executor *de son tort* is not affected by the act of 1785, *ch.* 80; if he is, he is equally affected by the act of 1798, *ch.* 101. If he could be legally made a party, the judgment could not be entered against him, but in pursuance of the act of 1798. The proceedings being clearly erroneous, the judgment must be reversed.

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Magruder, for the Defendant in error. It has been contended that the judgment of the court below must be reversed, because it is against an executor *de son tort*, who it is said cannot be made a party, under the act of 1785, *ch.* 80, to the original action. The correctness of this idea will be questioned; but to obtain a reversal of the judgment, something more is necessary to be shown. It is necessary to prove, not only that the action cannot be continued against an executor *de son tort*, but also that he can avail himself of the objection in a court of error, and after he has confessed judgment in the court below.

1. Before the act of 1785, the death of either party abated the suit. Upon the death of the defendant, the plaintiff was obliged to proceed *de novo*. The inconvenience of this was felt, and to remedy it, was the evident intent of the legislature in making the act of 1785, *ch.* 80, where it is declared that no action shall abate by the death of the defendant, but the executor, administrator, or "other proper person to defend," shall be made a party. If an executor *de son tort* cannot be made a party defendant to the original action, what meaning will be affixed to these words of the law, "other proper person to defend?" The words unquestionably include executors *de son tort*, who are responsible to the plaintiff on account of the assets in their hands, and who are proper persons to defend the original action under the law of 1785; because, before the passage of that law they were liable in an original action. The intention of the legislature unquestionably was, that the old suit should be continued against any person against whom a new action could be instituted; and that executors *de son tort* may be made parties to the original suit, is evident, not only from the intention of the legislature, but the words of the law. Indeed, these words, "other proper person to defend," seem to have been introduced *ex abundanti cautela*, and to prevent the possibility of an abatement of the original action, if there can be found any person, who, having in his hands assets of the original defendant, is, to the amount of them, responsible to the creditors. Every person who takes possession of the assets of a deceased debtor, is, in respect to creditors, the executor; and whether the possession of them has been rightfully or wrongfully acquired, are responsible as executors to the amount of those assets, to the creditors. It is no defence

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by a man who has seized upon the fund for payment of debts due from a deceased person in actions by creditors, that his possession of them is not legal. The creditors are not bound to enquire whether the possession is rightful or wrongful. The plaintiff in error would not have been allowed, in the court below, to avail himself of such a defence. It is true that an executor *de son tort* cannot be made a plaintiff in the original action; because he has no right to demand the debt, and before the act of 1785, he could not have brought an action for the recovery of it. Under the act of 1785, any person can be made a party defendant against whom the plaintiff in the action could have proceeded in an original suit, to be brought before the passage of that act. It is asked, how is a plaintiff to proceed if there be several executors *de son tort*—can he make only one of them, or is he at liberty to make all of them, parties to the original suit? An answer to this is not necessary. It is sufficient to say, that he may make as many of them parties to the original suit as he could to a second action to be brought by him upon the abatement of the first. But if this be not a sound construction of the act of assembly, yet it remains to be enquired,

2. Whether the plaintiff in error is not too late with his objection? It may be true that an executor *de son tort* is not a proper person to defend the original action, and therefore is not to be made a party to it, yet it is apprehended, that this defence ought to have been made in the court below; and having been waived there, cannot be relied upon in error. Leave is given to the plaintiff to make a proper party, and because he suggests to the court that the plaintiff in error was a proper person to defend the suit, a summons is directed to him to appear *and show cause why the suit should not be continued against him.* It was not incumbent upon the plaintiff below to show for what reason the suit might be continued against him—in what relation he stood to the debtor, or to the fund; being suggested to be a proper person to be made a party to the suit, he is required to appear and state his objections to a judgment being recovered against him. If there were not in his hands assets sufficient to discharge the plaintiff's claim in due course of administration, this might be shown; and if pleaded, the plaintiff could only recover against him upon proof of assets. But if this is not pleaded, the judgment would

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of course be for the amount of the plaintiff's claim So too, if not a proper person to be made a party to the suit, this ought to have been stated to the court, either at the time of his appearance, or by plea, and whether he was or was not, being in some measure a question of fact, would have been examined, where alone it could be examined, in the court below. Instead, however, of making this defence, or of showing any cause why he should not be made a party, he has confessed judgment, and thereby admits himself to have been a proper person against whom the original suit was to be continued. Having, by his confession of judgment, acknowledged himself to be the proper person to defend the suit, the objection, now so strenuously urged against an affirmance of the judgment, cannot be heard in this court. It is true, indeed, that in the summons which was issued against him, and which the clerk has unnecessarily copied into the record, he is styled executor *de son tort*. Whether this proceeded from any knowledge possessed by the clerk that letters testamentary had not been granted to him, or from his ignorance that a rightful executor and an executor *de son tort* were different characters, does not appear, and is wholly unimportant. The appellation given to him in the summons cannot be resorted to in proof of his being an executor *de son tort*. The summons does not belong to the record—it makes no part of the pleading, and was not necessary to have been issued. Any incorrectness in it cannot prejudice the plaintiff below. It might have been directed to any other person—might have stated *John Nokes* as the proper person to appear to the suit; and might have mistated the names of the original parties, and the nature of the action; yet if the plaintiff in error chose to appear to the suit, and in place of showing cause below why judgment should not be given against him, to confess judgment, he cannot afterwards come into a court of error and claim a reversal of the judgment, because of any false description, or blunders of the clerk in the summons. If A bring an action against B, and his writ state him to be executor of C, yet he may afterwards declare against him for a debt due from himself, and after a judgment by confession, or upon verdict, in the court below, it would be strange if in error his counsel urged that he was sued as executor for a claim due from himself. Whether the plaintiff in error was a rightful or wrongful

executor, is a question which cannot be examined here. It is a question of fact. The counsel for the plaintiff in error contend that this court is competent to decide it, and they produce for their testimony the *subpena*, which they say is conclusive evidence of the fact. The plaintiff in error is precluded by his confession of judgment in the court below from denying himself to have been the proper person to be made a party to the action, and in this court must be considered as the executor of the original defendant.

3. Objection has been made to the form in which the judgment is stated. It seems, however, to be such a judgment as must be recovered against an executor. The plaintiff in error made no defence in the court below. He could not gainsay the debt, and therefore the sum due to the plaintiff below is first ascertained. While a provision of the act of 1798, *ch.* 101, was in force, he was not bound to plead *plene administravit*, and refusing to admit a sufficiency of assets, the court were obliged to appoint an auditor. Thus far unquestionably the proceedings were regular, and the record is correct. But the appointment of auditor is afterwards stricken out and a judgment is entered, which the record states to be given upon the "confession of the defendant in the plea aforesaid." *Herein all the error lies.* It has been said that the confession did not warrant the judgment—that the confession was, that he could not gainsay the debt, and the court, by giving judgment "upon his confession in the plea aforesaid," have undertaken to say that he had assets, without any proof before them; for his confession was a denial of it. This however seems to be quarrelling with forms. The record, if correctly understood, will certainly show that the judgment was properly entered. The *plea aforesaid*, (however strange an expression it may be, as here introduced,) relates to the reference to an auditor to ascertain assets. *Plene administravit*, though not pleaded, became unnecessary by the act of 1798, *ch* 101, is supposed to be the defendant's plea, and is certainly the only plea on which he ever pretended to rely. The confession spoken of is a confession with respect to that plea, and of a sufficiency of assets. It is a confession made by the defendant after the appointment of an auditor, and in consequence of which the appointment was stricken out, and

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judgment entered according to it. In a few words, the defendant at first admitted the debt to be due, but would not confess assets. In consequence the sum was ascertained, but an auditor was appointed to ascertain the amount of assets. The party afterwards confesses there were assets sufficient, and in consequence the appointment of auditor was stricken out, and upon his own confession of a sufficiency of assets in his hands to discharge the debt, the court entered against him the judgment, which in all such cases is given. It is said to have been given upon motion of the plaintiff. But this is the form of entering all judgments by confession. The whole proceedings are regular, unless, because an auditor had once been appointed to ascertain the amount of assets, it was not in the power of the parties to take the subject out of his hands, and ascertain, by their own confession, the fact which it was the sole purpose by the reference to determine. The forms of records might indeed be more correctly and elegantly expressed, but these are forms to which we are most accustomed, and have in them sense enough to prevent the reversal of a judgment, to which the consent of the party was had in the court below.

THE COURT considered that the summons for the executor *de son tort* to appear and defend the action, issued regularly, and that the executor *de son tort* could be made a party to the action; but that the entry of the judgment was erroneous.

JUDGMENT REVERSED.

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In executing a commission to take testimony, it is not necessary that the commissioners should appoint a clerk

APPEAL from *Baltimore* County Court. Action on the case against a *common carrier* for negligence, &c. The general issue pleaded. A *commission* by consent issued to *London*, for the purpose of obtaining testimony, and was returned, with the testimony taken under it. At the trial in the county court, the plaintiff, (now appellee,) offered in evidence the commission and the testimony, to which evidence the defendant, (now appellant,) objected, on the ground that it did not appear that the commissioners, named in the commission, appointed a clerk. But the county

court, [*H. Ridgely*, Ch. J.] overruled the objection. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

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The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, J. by

W. Dorsey, for the Appellant; and by
Brice, for the Appellee.

JUDGMENT AFFIRMED.

HAMMOND vs. HIGGINS, *et ux.*

JUNE.

In an action of dower a judgment was confessed for the demandant's dower claimed in the lands. A writ of *Habere facias seisinam* issued, and the demandant's dower laid off. On the return of the writ, the county court entered judgment for nominal damages, and costs. On appeal, the judgment for the damages and costs was reversed

APPEAL from *Frederick* County Court. This was an action of *Dower*, to which the defendant, (now appellant,) appeared, and confessed judgment, which was entered in favour of the demandants, (now appellees,) for the dower of the wife, of the third part of two tracts of land called, &c. to hold to them in severalty by metes and bounds; and on the prayer of the demandants, a writ of *habere facias seisinam* was awarded and issued, to cause them to have full seizin of the third part of the lands, &c. which writ accordingly issued, and the dower in the lands were laid off and assigned by a jury, and delivered by the sheriff to the demandants, and on return thereof being made to the county court, the demandants prayed judgment, "as well for their damages sustained by occasion of the detention of the dower of the said *S.* in the lands aforesaid, as also for their costs and charges by them laid out and expended," &c. The county court entered judgment in favour of the demandants against the defendant, for "*one penny* current money, for their damages sustained by occasion of the detention of the dower aforesaid, as also *ninety five pounds and one penny* current money, adjudged by the court to the demandants for their costs and charges by them laid out and expended," &c. From which judgment the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. POLK, BUCHANAN, NICHOLSON, and EARLE, J.

Martin, for the Appellant, contended that the whole of the proceedings, after the judgment for dower and the

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awarding the writ of *habere facias seisinam* was erroneous. No judgment for damages and costs could be entered after the term at which the judgment for dower was rendered. The form of the writ of seizin was erroneous. It should go to the sheriff only, and he is to be aided by no person unless it is necessary to lay out the land, when he can call on the surveyor of the county to run it out. Precedents of writs of *habere facias seisinam* may be found in *Clift's Ent.* 298. *Rast. Ent.* 285. 1 *Rich. C. P.* 296; and 2 *Harr. Ent.* 697. The proper return by the sheriff should be, "I have delivered seizin by metes and bounds," &c. *Rast. Ent.* 355. The form of the writ used in the case before the court, is that of a writ of partition, and not of *habere facias seisinam*. The judgment in partition is interlocutory, but in dower it is final. Here the judgment being by confession, there could be no damages and costs even if the application had been made therefor at the proper term.

Shaaff and *Taney*, for the Appellees.

THE COURT considered that the judgment of the county court, as to the damages and costs recovered, was erroneous.

JUDGMENT REVERSED.

JUNE.

TOMLINSON vs. RIZER.

In trespass *Q. C. F.* the defendant took defence for, and located on the plots, a tract of land called *G C*, which included the tract called *T N*, on which the trespass was alleged to have been committed, and which last tract the plaintiff located on the plots; and he also located lot No. 3341; but he did not counter locate the location made by the defendant. The defendant read in evidence the grant of *G C*, which called to begin at the end of the second line of lot No. 3281.—*Held*, that it was not necessary for him to produce the grant of lot No. 3281, to prove the location of that lot, and the beginning of *G C*.

The court refused to direct the jury in an action of trespass *Q C F*, that it was incumbent on the plaintiff, in order to support his action, to prove a title to the land, on which the trespass was alleged to be committed, or to prove an actual possession by enclosures, located on the plots.

ERROR to *Allegany* County Court. An action of trespass *quare clausum fregit*, was brought by the defendant in error, against the plaintiff in error, for breaking and entering the close of the defendant in error, called *Trouble for Nothing*, lying in *Allegany* county. The defendant in the court below pleaded, 1. *Not Guilty*, and 2. *Justification* that *locus in quo* was a close of land called *Grate's Sugar Camp*, and the *freehold* of *John Hains*, and that the defendant, as his servant, and by his *license*, entered, &c. general *replication*, and issues were joined. There were other replications to the last plea, which were dumurred to, but as they were not noticed by the court, they are

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omitted. A warrant of resurvey issued, and the lands called *Trouble for Nothing* and *Grate's Sugar Camp*, and the place where the trespass was alleged to have been committed, as also lots No. 3350 and No. 3351, were located on the plots returned. The defendant took defence for *Grate's Sugar Camp*, as including *Trouble for Nothing*, to which there was no counterlocation made on the plots.

1. At the trial the defendant read in evidence a grant of the land called *Grate's Sugar Camp*, to *John Hains*, on the 1st of March 1802, "beginning at the end of the second line of lot No. 3351, and running thence N 27 E 46 perches, S 26 W 90 perches, S 62 W 50 perches, thence by a straight line to the beginning," &c. The plaintiff then prayed the opinion of the court, and their direction to the jury, that it is incumbent upon the defendant to produce patents of lots No. 3350 and 3351, to prove the beginning and location of *Grate's Sugar Camp* to be correct; to which direction and opinion being given, the defendant objected, and prayed the court to direct the jury, that as the plaintiff has located the lots No. 3350 and 3351, and *Grate's Sugar Camp*, upon the plots, including the place where the trespass is located as committed, it is not necessary for the defendant to produce patents for lots No. 3350 and 3351, to prove the location of those lots, and the beginning of *Grate's Sugar Camp*. But the county court, [*Clagett* Ch. J.] refused to give the direction prayed by the defendant; and gave the direction prayed by the plaintiff. The defendant excepted.

2. The defendant then prayed the opinion of the court, and their direction to the jury, that it is incumbent on the plaintiff, in order to support his action, to prove a title to *Trouble for Nothing*, or to prove an actual possession by inclosures located upon the plots Which opinion and direction the court refused to give. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant brought a writ of error to this court.

The cause was argued at the last June term before Polk, Buchanan, Nicholson, and Gantt, J.

Johnson, (Attorney General) and *Perry*, for the Plaintiff in error, cited *Dockery vs Maynard*, 1 *Harr. & M'Hen.* 209. *Jarrett vs West*, 1 *Harr. & Johns.* 501.

T. Buchanan argued for the Defendant in error.

Curia adv. vult.

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THE COURT, at this term, disagreed with the court below in the opinion expressed in the *first* bill of exceptions, but concurred with them in that expressed in the *second* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

JUNE.

HAMMOND VS SAPPINGTON.

WHERE a valuable consideration, contracted with, and conveyed to J. S. by metes and bounds, 800 acres, part of a tract of land, "situate, lying and being, in the state of *Kentucky*, in the county of *Bourbon*, and *on the main branch of Licking*" A grant of the land described it as "lying and being in the county of *Bourbon*, on *the main branch of Licking*, in the state of *Virginia*." After the grant of the land, a new state, by the name of *Kentucky*, was formed from *Virginia*, and the county of *Bourbon* became a part of *Kentucky*, which county was afterwards divided, and two new counties erected, called *Clarke* and *Mason* counties, and the land now lies in these two counties. J. S. filed his bill in chancery to have the contract vacated, and the consideration money repaid to him, &c. *Decreed*, that his bill be dismissed.

APPEAL from the Court of Chancery. The bill of the complainant, (now appellee,) filed on the 3d of September 1802, stated, that in the year 1796 he purchased of the defendant, (now appellant,) a *mill-seat*, in *Anne-Arundel* county, at and for £160 money paid down at the time, and obtained possession; and not doubting but that a clear title could be given to him by the defendant, he improved the property, and expended in improvements £120. That finding afterwards that the defendant had no right to the land, he applied to him to repay the money expended, and to refund that which he had received; which the defendant refused to do; but again practising another deception and imposition, he agreed to sell and convey to the complainant, in consideration of the premises, and the money paid and expended for and on the *mill-seat*, 800 acres of land situate in *Bourbon* county, in the state of *Kentucky*, and accordingly executed a deed therefor, dated the 10th of February 1796, in which the land is described "as all that part of a tract or parcel of land, contained within the metes and bounds of a tract of land, containing in the whole 6134 acres, beginning for the said part at the beginning trees of the whole tract, and running" &c. describing the part by metes and bounds, "situate, lying and being, in the state of *Kentucky*, in the county of *Bourbon*, and *on the main branch of Licking*, containing 800 acres," &c. That the complainant made preparation, and did remove to the state of *Kentucky*, and went in search of the land in *Bourbon* county, and according to the description contained in the deed, but to his great surprise no such land was there to be found, to which the complainant had any kind of claim or title; that he caused the records to be examined, and the result was, that the complainant owned no land in that

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county. That he called on the defendant, and informed him of the premises, and requested him to refund the sum of £280, the consideration of the purchase of the land, and to make him compensation for the loss of time, &c. but the defendant refused to do either. *Prayer*, that the money be decreed to be repaid, and for further relief, &c. The *answer* of the defendant denied that he had no title to the *mill-seat*. That at the instance and request of the complainant, he consented to give him his right in 800 acres of land in *Kentucky*, for the *mill-seat* and improvements, the complainant alleging that the lands the defendant was to give him his right in, were good in quality, and that *J. D.* his brother-in-law then in *Kentucky* knew the lands, and had informed him of their quality. The defendant showed his title in the lands to the complainant, being patented to *Richard Ridgely*, esquire, on the 23d of November 1790, and conveyed to the defendant by deed dated the 2d of November 1793, and duly recorded, &c. That the patent for the land was granted before the adoption of *Kentucky* as a state in the union; and when the warrants were granted for the land, for which the patent issued, the land lay in *Virginia*, and in *Bourbon* county. That since that time *Kentucky* has become a state, and the county of *Bourbon* has been divided, and two new counties have been erected, called *Clarke* and *Mason* counties, and that the land lays in those counties. He denies all fraud, &c. The *grant* for the land, as exhibited, is dated the 3d of November 1790, and was issued by the governor of the state of *Virginia* to *Richard Ridgely*, and the land is therein described to be a tract or parcel of land containing 6134, acres, lying and being in the county of *Bourbon*, on the main branch of *Licking*, &c. *Commissions* issued and testimony was taken thereunder.

Hanson, Chancellor, (June term 1805.) It is evident that the defendant was satisfied the first contract made with the complainant ought by him, as an honest man, to be rescinded; and that the complainant had sustained a grievous disappointment. This is an important consideration in the cause. Well then, to do justice to the complainant, it was incumbent on the defendant to refund the purchase money, and price of the improvements, with interest. But instead of doing this, he proposes to convey a

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large tract of land in *Bourbon* county, in *Kentucky*. The complainant accepts the offer, but is again disappointed. It is clear that the defendant's land, if any he has *at* the place or *near* the place, &c. does not agree with the description. *It is not in Bourbon county*. Says the counsel there are two descriptions, and if *one* is answered, it is sufficient. This is indeed the rule in some cases. It is a rule in favour of grantees. But in a case like the present, that is to say, with respect to bargainees, the rule is reversed. What! If a man agrees to procure me a horse 17 hands high, and of a bright bay colour, will it be sufficient for him to bring me a horse of a bright bay colour only 15 hands high? It is at my option whether I will take the horse or not.

The contract appears to be for 800 acres of land in *Bourbon county, on the main branch of Licking*. Suppose then the defendant to have land on *Licking* but not in *Bourbon* county, is it conceivable that he complies with his contract by conveying this land? Ah! but *Bourbon* county once contained that land, but on a division of the county, the land constitutes part of *Mason* county. It is in vain to argue this way. Is it necessary to mention the first rules of equity with respect to contracts forbidding all trick, finesse or deception, or even misunderstanding? In short, it appears to the chancellor, that the complainant was in a manner, or might well suppose himself to be, under the necessity of making a contract for land, which, independently of the contract for the *mill-seat*, he would neither have offered to purchase, nor have purchased, if offered; that neither of the parties were acquainted with the thing contracted for, and that the complainant has twice been deceived. In saying this the chancellor means no imputation on the defendant, who certainly acted honourably with respect to the first contract, and who probably has withstood the claim of the complainant, because he has himself been disappointed, &c. To sustain the fair character he has enjoyed during a long life, he can do no better than perform the following decree, without delay—*Decreed*, that the contract between the complainant and defendant for the sale and purchase of 800 acres of land in the state of *Kentucky*, as stated in the bill and answer, be vacated and annulled, and that the deed to the complainant from the defendant, executed in consequence thereof, dat-

ed the 10th of February 1796, and filed in this cause, be vacated and annulled, so far as the power of this court extends, and that the complainant, on the defendant's demand, shall reconvey the said land to the defendant, in the same manner as the defendant conveyed to him. But this may not be done until the defendant shall bring in or pay the money as herein after directed. That the defendant bring into this court, to be paid, or that he pay, to the complainant, the sum of £280. with interest from the 10th of February 1796; or that on the 10th of February next, he bring into this court to be paid, or that he pay, to the complainant, the sum of £438 8 6, that being the amount of the money paid by the complainant to the defendant, and of the improvements by him made on the *mill-seat*, &c. with interest, &c. That the sum last mentioned, if not paid on the last mentioned day, or if the principal and interest be not before discharged, shall carry interest from the last mentioned day. But costs are not to be allowed the complainant. From which decree the defendant appealed to this court.

The cause was argued before Polk, Buchanan, Nicholson, and Earle, J.

Shaaff, for the Appellant. The land was sold as lying in *Bourbon* county, in the state of *Kentucky*, and is described by *metes and bounds*. The fact is, that the land, at the time it was granted, was situate in *Bourbon* county in the state of *Virginia*. At the time it was sold a new state had been erected by the name of *Kentucky*, and from the county of *Bourbon* two counties had been taken, called *Clarke* and *Mason* counties. The defendant's answer alone supplies the proof required by the bill. That taken under the commissions does not make out the plaintiff's case. When speaking of land laying upon the waters of any great river, it does not mean necessarily that the water flowed by the land. The meaning is, that it was at no great distance, or it was the next contiguous water to it. The decree of the chancellor vacates a deed for land in the state of *Kentucky*. This he had no authority to do. The decree is also incorrect in another particular—it should have been, that upon a reconveyance of the land by the complainant to the defendant, then the latter should pay, &c. But the chancellor has annulled the deed, which he

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could not do, and if the money is paid, the defendant loses both the money and the land. But independently of this objection, the facts stated in the bill have not been proved by the testimony taken in the case. There has been no evidence whether the land lay in *Kentucky* or not. Nor is there any evidence that the complainant called upon, or gave notice to the defendant that the land was not in *Kentucky*. But after laying by six years, he now wishes for the money to be refunded. He may have sold the land, or it may have been sold for the taxes due thereon. A stale, forgotten claim, is discountenanced by the court of chancery. The point of time, when a claim is considered as stale, is affixed to the nature of the transaction. Here the land, in a remote state, was abandoned for six years, and most likely it has been sold to pay taxes. There is no evidence that the land does not lie as stated in the deed. As to where it does lie, is susceptible of better proof than that produced. The only proof is in the defendant's answer, and that must be taken as proof, and being so, there is an end of the case. The land exists according to its *natural description*, as described in the deed; and admitting the whole allegation of the bill of complaint, the contract was a valid one. It is not denied but that the defendant had a right to the land; but it is alleged that it does not lie in *Bourbon* county. This may be assimilated to a story told of an old lady in *South Carolina*, who always supposed she resided in a particular county, but upon running the county lines it was discovered that her residence was in a different county, at which circumstance she was greatly concerned, for she observed that she had always heard that the county in which her residence was held to be, was a very *unhealthy county*. The chancellor, by his decree, has said, that there is a difference between grantees and bargainees. It is difficult to ascertain the distinction. A deed may be vacated on the ground of fraud, &c. but a mistake in a contract does not vacate it. Relief may be had without its being vacated. If A sells 100 acres of land, and it holds out to contain only 50 acres, would the court of chancery vacate the contract? Surely not; but it would give damages for the deficiency of land. Here there was no fraud alleged. It may be considered as a mistake as to the name of the county in which the land lay; and if the land was of less value in one coun-

ty than in another, could not relief be given without vacating the contract? There is no dispute as to the quality or quantity of land. If the complainant had produced proof that the land being considered as lying in *Bourbon* county, was the only inducement to the purchase, then it would lay a foundation for vacating the contract; but nothing of the kind is alleged, or appears in proof. The land is described as laying on the waters of *Licking;* and the proof is, that it does lie there. As to the land's lying in this or that county was no inducement to the purchaser, but if it was not in value equal to that intended to be sold, the chancellor ought to have compensated in damages, and not vacated the contract. Before the complainant asked for equity, he ought to have done equity. He should have reconveyed the land to the defendant, according to the laws of *Kentucky*. But he claims both the land and money, and the chancellor has so decreed as to give him both land and money. There is some evidence taken as to the value of the land near to the court-house, and land high upon *Licking*. Better proof than that which was taken could have been had by sending a commission to the very place.

Johnson, (Attorney-General,) for the Appellee. The grant for the land describes it as lying on and crossing *Licking*, in *Bourbon* county, in the state of *Virginia*, and it is dated the 23d of November 1790. The survey was before the division of the state, and the grant was after the division. The act erecting *Mason* county was on the 5th of November 1788, and the act erecting *Clarke* county was on the 9th of December 1792. The land when it was granted could not lie in the county of *Bourbon* from the description given of it in the grant, and that given of the county. Suppose A buys land lying on the *Potomac* in *Frederick* county, and it turns out that it lies in *Allegany* county on the *Potomac*, would he be bound by his contract and be compelled to take the land? Suppose indeed it lay in *Saint-Mary's* on the *Potomac*, would it be considered as an immaterial circumstance provided it lay upon the *Potomac*, a long extended river? *Licking*, or any other river, is not so good a description as a county. When this contract was made the defendant had no land on *Licking*, in the county of *Bourbon*. The land was represented to be 19 miles from *Bourbon* court-house, and — miles from

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Lexington. The evidence of *Sewell* is, that the defendant said that the complainant "will not find a *Johnny Snowden* in me," meaning, that if he does not find the land, he would not recover of him as he had of *Snowden*. There is proof that the defendant refunded to *Aldridge*, who had purchased part of the same tract. Where there is a trivial circumstance, the chancellor does not annul the contract, but where there is a material one which goes to the essence, then the contract is annulled. The defendant is bound to show that the circumstance is not material. There is no proof at all on the part of the defendant. He ought to have showed that his deed passed the legal estate, according to the laws of the country, before he complains of the deed's being annulled. This court can give that decree which the chancellor ought to have given, if his is erroneous. How could the complainant prove that the land was not there? It was proving a negative. The defendant should have proved that it was there. But it has been said that the deed answers the natural description of the land. It was more material that the land should lie in *Bourbon* county, than on *Licking*, a river of perhaps 160 miles in length. On the part of the complainant it is contended, that both descriptions should be complied with, so as to bind him to the contract. It has been said, that under the decree the defendant loses his land and money. But suppose the decree is reversed, and it turns out that the land is swallowed up by elder surveys, then the complainant loses the land and the money.

Shaaff, in reply. The *onus probandi* is on the complainant; he avers a fact which, if denied, he is compelled to prove before he can succeed. The attorney-general has said, that one description failing, the defendant is bound to show it is not a material one, which goes to the essence of the contract. This is not so. If the complainant has sustained damage, he must prove it. The proof is not made out on the part of the complainant, and he is obliged to resort to the defendant's answer, and if he does, the answer must be taken all together. The law of *Virginia* has been resorted to for the purpose of showing that the land does not lie in *Bourbon* county. It is not possible to say by that law whether or not the land lies in that county. It is not denied, that if there is an

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immaterial circumstance which affects the contract, that redress ought to be had in damages. As to when *Kentucky* was admitted into the union, See 1 *Vol. Laws of U. S.* 394. The land having been once in *Bourbon* county, is sufficient. *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 193. Suppose a deed for a house in *Hager's*-town, in *Frederick* county, would it be a good deed? The house in *Hager's* town must have been the essence of the contract. As to *Sewell's* testimony that the defendant said the complainant would not find a *Johnny Snowden* in him, the meaning is, that as the complainant had alleged that *Snowden* had cheated him, (which was not true,) the complainant would not be cheated by him, as the land was to be found.

Ridgely, also in reply. The decree of the chancellor is erroneous on two grounds—1. The court of chancery had not jurisdiction, and the decree cannot be enforced. 2. If the court of chancery had jurisdiction for compelling a specific performance of the contract, yet there is no proof in the case that there was fraud, mistake, &c. upon which to give relief.

First position. A subsequent division of the state, and forming a new one, and the laying off new counties, did not alter the contract, as the land could not be affected by any such proceeding. The decree cannot be enforced in this court. The remedy is to be against the person, and not against the thing. Suppose the appellant complies with the decree, by paying the money, what process can he have to compel the appellee to comply? Suppose the appellee had paid the appellant the money, and the latter had refused to convey the land, could the court of chancery compel a specific performance of the contract? The court had no power to compel a deed. It might decree the money to be refunded. If the chancellor had decreed a deed, could the decree operate in *Kentucky?* It certainly could not. It is evident that the chancellor had no jurisdiction to enable him to make this decree; there being no mutuality as it affected the parties. He doubted his own power, for he says "so far as the power of this court extends." This shows that he did not think he had jurisdiction to vacate a deed for land in another state. The appellee was guilty of *laches*, and is therefore not to be benefitted by it. He

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may have conveyed the land away, or it may have been sold to pay the taxes on it.

Second position. Admitting the court had competent jurisdiction to give the relief prayed, yet there is not sufficient evidence upon which the relief could be grounded. The answer denies the material facts relied on by the bill. The reason for rescinding the first contract was not for the cause stated by the chancellor. It was fully proved, that no dam could be made so as to prevent the water from overflowing on the neighbouring lands. The first contract was fair and honest; and the rescinding it was perfectly agreeable to both parties, and was done at the instance of the appellee, who instead of wishing the money to be refunded, was desirous to take *Kentucky* land. There is no proof that the appellee, when he went to *Kentucky*, made the necessary inquiry as to where the land lay. If the land lay in this state, it was not such a contract as ought to be annulled upon the mere ground of its not lying in the *county*, if it conformed to the other descriptions.

DECREE REVERSED.

DEC. (E. S.)

On the death of S E, a resident of this state, a slave belonging to his estate, was, by a bill of sale executed by his administrator in 1792, sold to G D, also a resident of this state, but who immediately afterwards removed to *Virginia*, and took the slave with him. On a petition filed by the slave against G D for his freedom—*Held*, that he was not entitled to freedom.

NEGRO GEORGE VS. DENNIS.

APPEAL from *Somerset* county court. This was a petition for freedom. The facts of the case, as admitted at the trial, were these—The petitioner, (the appellant,) was the property of *Samuel Engersole*, who resided in *Somerset* county, and on his death, came to the possession of *Richard Engersole*, his administrator, who resided in the same county. *R. Engersole*, the administrator, by bill of sale dated the 16th of October 1792, sold the petitioner to the defendant, then a resident also of the said county, and who immediately afterwards removed to the state of *Virginia*, and took the petitioner with him. The court, *(Polk*, Ch. J. and *Done*, A. J.*)* were of opinion, and so instructed the jury, that these facts were not sufficient to entitle the petitioner to his freedom. The petitioner excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, NICHOLSON, GANTT, and EARLE, J. by

W. B. Martin, for the Appellant; and by

J. Bayly, for the Appellee.

JUDGMENT AFFIRMED.

BOREING'S Lessee vs. SINGERY.

1809. DECEMBER.

Boreing vs Singery

A surveyor's original book of surveys, and his parol testimony, admitted by the general court, in an action of ejectment, as competent evidence to prove that a certificate of survey returned to the land office, was forged

The general court refused to direct the jury, that it is not competent in a court of law to give evidence to the jury, or to go into any parol examination of the surveyor, or his books, to vacate a grant, or to prove that the certificate of survey returned to the land office as a foundation for the grant, was forged or fraudulent, and not made out by him or his authority

The proprietary instructions, requiring a survey to be made of reserved lands, &c. read in evidence.

Depositions returned under a commission issued to *Pennsylvania*, to take testimony in the cause, were not permitted by the general court to be read in evidence, it not appearing, by the return of the commissioners, that they had given any notice, or that proper notice had been given.

Depositions similarly taken were not permitted to be read in evidence, although offered in evidence by the opposite party.

ERROR to the General Court. In this case there was a writ of *procedendo* from the late court of appeals, directing a new trial of an action of ejectment, (which had been tried in the general court at October term 1799,) for a tract of land called *Boreing's Habitation Rock*, lying in *Baltimore* county, containing 300 acres of land. [See 4 *Harr. & M'Hen.* 398.] The defendant took defence on warrant for all that part of *Boreing's Habitation Rock*, which is included in *Singery's Trouting Streams*, according to his locations thereof on the plots returned in the cause.

1. The plaintiff, at the new trial at October term 1805, read in evidence the patent of *Boreing's Habitation Rock*, granted to *Ezekiel Boreing*, the lessor of the plaintiff, on the 24th of April 1795, for 300 acres of land more or less. The defendant produced a grant issued to him the 20th of April 1775, for the tract called *Singery's Trouting Streams*, for which he took defence. The plaintiff then produced the original certificate out of the land office for the land called *Singery's Trouting Streams*, dated the 30th of September 1770; and gave evidence by *James Calder*, that he was surveyor of *Baltimore* county when the original certificate was returned to the land office, upon which the patent for *Singery's Trouting Streams* was granted; and that the certificate, on which the patent issued, was not made out or signed by him, or by his authority; that the original certificate, as entered upon his book of surveys, contained no call to the beginning trees of the tract of land called *Petticoat's Loose*, nor was there any such call in the certificate as made out by him, or under his authority. That the certificate, as made out by him to be returned to the land office, described the land called *Singery's Trouting Streams* as "beginning at two bounded white oaks standing between two barren hills at the end of the last line of a tract of land called *Merryman's Mountain*, (included,) and about west nine perches from *George's* Run, and running thence," &c. (nineteen courses without any calls,) "and then with a straight line to the beginning, containing 178 acres," &c. as taken from his original book of surveys. The plaintiff produced this book in court, and offered to read it to the jury. He further offered to prove by *Calder*, that he had examined the ori-

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ginal certificate of *Singery's Trouting Streams*, with the entry on his book, before he delivered and signed the original certificate for the land office. By which evidence the plaintiff offered to prove to the jury, that the certificate of *Singery's Trouting Streams*, returned to the land office, and on which the patent issued, was a forgery, and could not operate to pass more land than was contained in the certificate signed by *Calder*. The defendant then offered evidence, that no other certificate of *Singery's Trouting Streams*, except the one on which the patent issued to the defendant, was ever returned to the land office. He also offered in evidence, the certificate returned to the land office, with the endorsements thereon, and the aforesaid patent. [*See them set out in* 4 *Harr. & M'Hen.* 398.] He also offered evidence, that *Calder* never did make out a certificate for *Singery's Trouting Streams*, from the entry made in his book; and to prove that a certificate for *Singery's Trouting Streams* never was examined with the said entry, he offered in evidence, by *Calder*, that he did not begin to survey lands in the *reserves* of *Baltimore* county before the 24th of November 1770, and that he would not have inserted a certificate in his book of an elder date than the 24th of November 1770, if he had taken notice of such a date. He also offered to prove, that there are certificates of surveys, contained in the said book, bearing date since the 4th of July 1776. He also offered in evidence the proprietary instructions to *Robert Eden*, *Daniel Dulany*, and *John Morton Jordan*, dated the 30th of June 1769*(a)*, requiring that they should forthwith, if necessary, cause an exact survey and return to be made of the lord proprietary's reserved lands and manors, &c. He also offered evidence, that *Calder* was appointed to survey the lands in the instructions mentioned; and to prove that *Calder's* authority ceased before the 4th of July 1776, offered in evidence the declaration of independence. He also offered in evidence, that the following part of the entry in the said book, and no more, is in the handwriting of *Calder*, to wit: "Amended for *Christian Singery*, a tract beginning at two bounded white oaks, standing between two barren hills at the end of the last line of a tract called *Merryman's Mountain*, (included,) and about west nine perches from *George's*

(a) Entered in the Council records, J. R. folio 241, &c.

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Run, and running then N 87 W 22 ps. S 47 W 96 ps." He also offered in evidence, by *Calder*, that the latter part of the said entry is not in his handwriting, and that he did not know in whose handwriting it was, but supposed it to be the handwriting of a man named *Norris*, one of his deputies. That the land included in the courses taken from the said entry, is in the *reserves* of *Baltimore* county; and that the entry made in his book, was made after the 4th of April 1775, but on what day he knew not. The plaintiff further offered evidence, by *Calder*, that the reason he recorded a certificate in his book, bearing date the 30th of September 1770, was from an oversight in his not particularly attending to the date of the certificate, and that he would have corrected the erroneous date had it particularly occurred to him. That he had a number of deputies, who were authorised by him to record certificates in his book, after they had been examined and signed by him. The defendant objected to the plaintiff giving any of the evidence offered by him, for the purpose for which it was offered.

Shaaff, for the Defendant, stated two objections to this testimony—1. Because the book was made without authority, and the entry was not made by *Calder* himself, nor examined by him, and from his own proof was not made until after the patent issued to the defendant. 2. Because it is contrary to the grant, and the grant cannot be held void in this court. He cited *Twyne's* case, 3 *Coke*, 80. 13 *Vin. Ab.* 519, 527. 2 *Com. Dig.* 575. 2 *Bac. Ab.* 602. *Lane*, 105, *(argt.) Upton vs. Basset*, *Cro. Eliz.* 445. *Bull. N. P.* 260. *Stat.* 27 *Eliz. ch.* 4. *Carvill's Lessee vs. Griffith*, 1 *Harr. & M'Hen.* 297. *Maxwell's Lessee vs. Lloyd*, 1 *Harr. & M'Hen.* 212. *Spalding's Lessee vs. Reeder*, 1 *Harr. & M'Hen.* 187. *Hammond, et al. Lessee vs. Sheredine*, 4 *Harr. & M'Hen.* 420; and *Webb's Lessee vs. Beard*, 1 *Harr. & Johns.* 349.

Martin, (Attorney-General,) and *T. Buchanan*, for the Plaintiff, were stopped by the court.

Chase, Ch. J. (sitting alone.) This question, he said, had already been decided in this case at the former trial at October term 1799, when there was a fuller court. He considered himself bound by that decision, even if he

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thought differently now. He therefore permitted the evidence to be read to the jury, being of opinion that the fact, whether the certificate was forged or not, was a material fact in this cause, and that the evidence offered by the plaintiff was competent and admissible evidence to prove that fact; and that the credit of the witness, and of the surveyor's book referred to, were subjects within the province of the jury, and proper for their consideration upon the whole of the case. The defendant excepted.

2. The defendant then, in addition to the facts before stated, gave in evidence, that the locations on the plots made on the part of the defendant are true, as by him located, and contained truly the land granted to him in 1775. And offered evidence to prove, that the land included in the grant comprehends the land granted to the lessor of the plaintiff, called *Boreing's Habitation Rock*, for which this suit is brought. He also read in evidence an office copy of the record and proceedings then depending in the court of chancery, between the lessor of the present plaintiff and the defendant, on a bill exhibited expressly to vacate the defendant's grant. And read in evidence the records and proceedings in the council chamber, by which a commission was created for the purpose of selling certain lands of the then Lord Proprietary of *Maryland*, which is herein before referred to, dated the 30th of June 1769; and proved, that the lands claimed by him in virtue of his patent, were claimed by him under a purchase from the persons acting under that commission, and were part of the private estate of the Proprietary, and not liable to be affected by the ordinary proceedings and usual practice of the land office. He also proved that *John Clapham*, whose name was to the receipt of the consideration money endorsed on the certificate of the land called *Singery's Trouting Streams*, stating that he had, on the 19th of April 1775, received of the defendant the sum of £71 4 0 sterling for the purchase money of that land, was then acting as clerk to the said commission. The defendant then prayed the opinion and direction of the court to the jury, that it is not competent in a court of law for the plaintiff, under the circumstances of this case, to give any evidence, or go into any parol examination of the surveyor, or his books, to vacate the defendant's grant, or to prove that the

certificate returned to the land office, as a foundation for that grant, was forged or fraudulent, and not made out by him or his authority.

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CHASE, Ch. J. refused to give the direction prayed. The defendant excepted.

3. The defendant then offered in evidence the commission which issued at his instance out of this court, on the 13th of September 1799, to *Huntingdon* county, in the state of *Pennsylvania*, to take the testimony of witnesses in this cause, with the depositions taken under it. The return to this commission, after setting forth the meeting of the commissioners, and their having taken the deposition of a witness in answer to certain interrogatories, concludes by the commissioners certifying, that "the foregoing interrogatories were taken at the instance of *Joshua Stevenson*, on his asserting that the plaintiff had knowledge of his coming, and intention of having this commission executed." To the admissibility of this evidence,

T. Buchanan, for the Plaintiff, objected, because there had not been *legal notice* to the plaintiff of the time of executing the commission.

Key, for the Defendant, cited *Norwood vs. Owings*, (*ante* 98,) where this court decided that notice was not necessary in executing foreign commissions.

CHASE, Ch. J. This case is not similar to that of *Norwood vs. Owings*. In that case the commissioners certified that they had given notice; but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given. The court are of opinion that the commission and return are not legal evidence, nor any part thereof. The defendant excepted.

4. The plaintiff then offered to read in evidence the commission, with the testimony returned with it, which had been executed and returned at the instance of the defendant, under a commission issued from this court to *Fayette* county in *Pennsylvania*, on the 14th of March 1798, but which the defendant refused to read. The return is as follows: "In obedience to a commission to us directed by the hon'ble the judges of the general court

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for the western shore of *Maryland*, we met at the house of *James Gregg*, in *Fayette* county, *Pennsylvania*, on the 1st of October 1798, and after taking the oath directed, we appointed *J. M.* clerk, who took the oath directed in the said commission. We then put the following interrogatories unto *Daniel Goodwin*, of the county aforesaid, being first duly sworn on the Holy Evangely of Almighty God, viz." [*Then follow the interrogatories and answers.*] "The foregoing interrogatories were taken at the instance of *Joshua Stevenson*, on his asserting that Mr. *Cooke*, attorney for the plaintiff, had knowledge of his coming, and intention of having this commission executed, and consented thereto. Given under our hands and seals," &c. Signed and sealed by the commissioners; and certificates that the commissioners and clerk had taken the oaths annexed to the commission to be by them respectively taken. The plaintiff also offered to read in evidence the deposition of *Daniel Goodwin*, named in the same commission, who at the former trial attended court, and his deposition taken in the city of *Annapolis* on the 23d of May 1799, before a justice of the peace, &c. by consent of parties, to be read at the trial of this cause, so far as the same contained legal testimony.

Chase, Ch. J. This commission is liable to the same objection as the other commission, and the court refuse to admit it to be read, being of opinion that the commission was not legally executed; and that the deposition taken in *Annapolis*, by consent of parties, was taken for the purpose of impeaching or counteracting the deposition taken under the commission. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff brought a writ of error to this court.

The cause was argued on the bill of exceptions taken on the part of the *plaintiff*, being the last bill of exceptions herein stated, before Buchanan, Nicholson, Gantt, and Earle, J. by

T. Buchanan, for the Plaintiff in error; and by *Shaaff*, for the Defendant in error.

JUDGMENT AFFIRMED.

Morrison vs. Galloway.

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In an action of covenant, brought on the 11th of February 1799, upon an agreement executed on the 18th of March 1796, between M (the plaintiff) and G (the defendant) stipulating *inter alia* that a complete merchant mill should be built by M of materials to be provided by G, who was also to provide a framed or hewed logged dwelling-house at the mill for M to reside in, and M agreed that he would take up his residence at the mill in the dwelling house, and would act as the manager and superintendant of the mill, which was to be worked for the joint benefit of M and G, in equal parts, M to receive one half of the nett profits, and G the other half. The copartnership to commence as soon as the mill should be ready to do work, and continue for ten years. That a regular set of books should be kept, which should contain all the transactions of the copartnership, and a settlement should be effected at the end of every year. The firewood should be furnished from the farm on which G resided, for the use of two fire places in the mill and dwelling house, at the equal cost of the parties for cutting and hauling it to the houses; and 12 acres of land, including two acres of bottom land most convenient to M, to be put under good and sufficient fence for his use. The declaration averred, that the mill was completed on the 21st of June 1798, and that M performed, &c. The breach assigned was, that G did, on the 31st of January 1799, forcibly eject M from the mill and premises, and still keeps him out. That G did not provide a framed or hewed logged dwelling-house at the mill for M to reside in. That G, on the day and year last aforesaid, after the mill was complete and put into complete motion, did prevent M from receiving one half of the nett profits of the mill, but that G did, contrary to the consent of M, receive the whole of the profits from the day and year last aforesaid, until the bringing of this action, and hath refused to pay any part thereof to M. Nor did G furnish M with 12 acres of land, including two acres of bottom land most convenient to M, under good and sufficient fence for M's use. The witness to the agreement was offered by G to prove what took place between G and M previous to and at the time of the agreement, as to their intention and meaning in the agreement; also another witness, who proved that when he was at work upon the dam for the mill, he received orders from G to build the dwelling-house for M, but that M told him to continue to work at the dam, and not to mind the house, as he could make a shift with the counting room in the mill, which he occupied, and declared that it answered his purposes very well, and that there was no occasion to build the dwelling-house until it suited the convenience of G. *Held*, that the construction of the agreement is a matter of law to be determined by the court. That parol evidence may be admitted to explain doubtful parts; but no evidence can be admitted to prove the agreement different, or to prove any additional agreement not included in or touched upon in the agreement. That the evidence offered did not dissolve or extinguish the contract, or bar the plaintiff's cause of action against the defendant for the breach in not building the house; that it was only a consent to a temporary suspension of the building of the dwelling-house, and is only proper in mitigation of damages.

Held also, that at the time of bringing the action, the plaintiff had a cause of action, being deprived of the benefits under the contract.

Held also, that the covenant on the part of the defendant, that the plaintiff should receive one half of the profits of the mill, is an independent covenant; and that it was not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with or fulfilment of every stipulation in the covenant on his part to be performed.

Held also, that it was not necessary for the plaintiff, in order to support his action, to prove that he took up his residence at the mill, and superintended the same as miller, and devoted his time and attention to the mill, in such manner as is usual for men under wages to do particular work; that he kept a regular set of books, in which were contained all the transactions of the copartnership, and that he effected a settlement of the partnership accounts at the end of the year 1798, or that he was prevented from doing so by the defendant. That it was only necessary for the plaintiff to prove that he did enter upon the management and superintendance of the mill according to the covenant, and did work and manage the same.

Held also, that for withholding from the plaintiff the one half of the profits of the mill, he could only recover therefor from the time when such withholding of the profits first commenced down to the time when the action was brought.

Held also, that the plaintiff might recover damages for one half of the nett profits of the mill down to the time of bringing the action only; and damages for the ejecting and turning him out of the possession of of the mill, and for all advantages and benefits which might attend or result from the possession thereof, during the unexpired term of ten years, not comprehended within the nett profits of the mill: and that an action or actions may be brought by the plaintiff against the defendant, for one half of the nett profits which might have been made, or may be made from working the mill under the contract, from the 11th of February 1799, during the continuance of the partnership under the same.

Held also, that this being an action founded on contract, the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him, (exclusive of his part of the profits of the mill,) according to the whole of the circumstances existing in the case, without reference to the force, if any, with which the plaintiff was dispossessed.

Held also, that it was no ground to arrest the judgment upon the verdict, (which was for the plaintiff,) because the declaration stated, as a breach on the part of the defendant, the not enclosing the 12 acres of land, &c.

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cute the said building. Be it remembered, that the parties aforesaid have agreed, and by these presents do agree, each with the other, that they will respectively do and perform the following engagement, agreeable to the plain intent and meaning thereof; that is to say, it is agreed on the part of said *Galloway*, that he will provide all the necessary materials for erecting and finishing said mill, and deliver them to said *Morrison*, at said mill-seat, in good order, and will also provide for said *Morrison*, and his workmen, meat, drink, washing and lodging, during the time of building said mill; the rafters, joists, studs and braces, to be sawed; the mill-house to be 40 feet by 45 feet, or 45 feet square, as said *Morrison* shall determine; to be two stories high, and an hipped roof; the foundation to be stone work; the superstructure of the mill to be framed work, and weather boarded and shingled; a counting room to be in the mill; and said *Galloway* to find a proper desk for the same; said *Galloway* to provide a framed or hewed logged dwelling-house, 24 by 20 feet, with a brick chimney, at said mill, for said *Morrison* to reside in; said *Galloway* further agrees to furnish, in due time, all articles necessary towards putting said mill in complete motion to do merchant and country work, as said *Morrison* may call on him for them, said *Morrison* taking care always to give said *Galloway* sufficient notice to enable him to provide the same; said *Morrison* agrees, on his part, that he will hew the timber, frame the mill-house as before mentioned, weather board it, and shingle the roof; make doors, windows and stairs; make two water wheels; start three pair of burr stones, four bolting cloths, rolling screen and fan, and make hoisting gears within and without, and boulting chest. *Item.* Said *Morrison* engages to complete the above work, after the proper foundation walls are built, for the sum of £450 current money. *Item.* It is agreed on the part of said *Morrison*, that he will take up his residence at said mill, in the dwelling-house aforesaid, and will act as the manager and superintendant of said mill, which is to be worked for the joint benefit and advantage of said *Morrison* and *Galloway*, in equal parts; that is to say, said *Morrison* to receive one half of the nett profits, and said *Galloway* the other half; said *Morrison* to engage the necessary persons to be employed in working said mill, and to remove them whenever he thinks proper; the money capital

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for the use of said copartnership to be provided in equal proportions by said parties. It is further agreed, that this copartnership shall commence as soon as the mill shall be ready to do work, and shall continue between the parties aforesaid for the space of ten years; but it is understood, that in case of the death of said *Morrison* before the end of said ten years, then this copartnership is to be dissolved immediately after such event shall take place. It is agreed that a regular set of books shall be kept, which shall contain all the transactions of the copartnership, and a settlement of the partnership accounts shall be effected at the expiration of every year. It is understood between said parties, that said *Morrison* shall never claim any wages for his management and superintendance of said mill, and the said business; nor shall said *Galloway* ever charge said *Morrison* with any rent for the use of the said mill; but that the one shall always be considered as a full satisfaction for the other; the firewood shall be furnished from the farm on which said *Galloway* now resides, for the use of two fire places in said mill and dwelling house, at the equal cost of the said parties for cutting and hauling it to said houses; and 12 acres of land, including two acres of bottom land most convenient to said *Morrison*, to be put under good and sufficient fence for his use. The hogs that may be supported by the sweepings and offals of said mill shall be considered as the joint property of the parties aforesaid; and the said *Galloway* is to employ, at his expense, a person to get the shingles to cover said mill and dwelling-house. In testimony whereof the parties aforesaid have hereto set their hands, and affixed their seals, the day—.Said *Galloway* agrees to pay to said *Morrison* such money as he shall require during the time he is engaged in the building of said mill, and the balance of his account at the time of completing the same." It was signed and sealed by the parties. The declaration alleged, that although the plaintiff had well and truly done every thing on his part to be done, according to the form and effect of the covenant, and did well and faithfully complete the mill on the 21st day of June 1798; and although he was always willing and ready to take up his residence at the mill, in the dwelling house mentioned in the articles of agreement, and offered so to do; and although he was ready and willing at all times to act as the manager and superintendant of the mill,

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and offered so to do; and he was always ready and willing to keep a set of books to contain the transactions of the co-partnership, and that a settlement of the partnership accounts should be effected at the expiration of each year—Yet the defendant did afterwards to wit, on the 31st day of January 1799, at, &c. forcibly, and against the consent of the plaintiff, eject and turn him from the mill and premises, and always hitherto hath, and still doth, keep him from the same; nor did the defendant provide a framed or hewed logged dwelling house, 24 by 20 feet, with a brick chimney, at the mill, for the plaintiff to reside in, according to the covenant; but the defendant afterwards, &c. after the mill was complete, and put into complete motion, did prevent the plaintiff from receiving one half of the nett profits of the mill; but the defendant did, contrary to the consent of the plaintiff, receive the whole profits for a long space of time, to wit, from, &c. until the day of the impetration of the original writ in this cause, and hath refused to pay or deliver any part to the plaintiff, although often requested so to do. And the plaintiff in fact avers, that the one half of the nett profits of the mill, for the time aforesaid, was and still is of the value of £2000 current money, to wit, &c. of which the defendant had notice. Nor did the defendant furnish the plaintiff with 12 acres of land, including two acres of bottom land most convenient to the plaintiff, under good and sufficient fence, for the plaintiff's use, but wholly refused, and still doth refuse, to furnish the land, or any part thereof, as by the articles of agreement he was bound to do; and so the plaintiff saith that the defendant hath not performed, fulfilled, kept and observed, the covenant between them made, but has broken the same; and hath hitherto wholly refused, and still doth refuse, to perform it to the plaintiff; wherefore the plaintiff saith he is injured, and hath sustained damage to the value of £5000 current money, &c. It was agreed between the counsel, to enter a general plea or performance of all the covenants, and take issue thereon, with leave to the defendant to give any thing in evidence which he might have pleaded in bar; and that all errors should be released except substantial errors in the declaration.

1. At the trial in the general court at May term 1803, *Dennis Davis*, a witness, proved, that in the summer 1797 he received orders from the defendant to build the dwel-

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ling-house in the declaration mentioned, and to take the slaves of the defendant to get and prepare the logs for that purpose, and to put them up. This direction was communicated to him by letter, the defendant being then absent from home at *Bath*, in *Virginia*. That he, the witness, was at that time at work with the slaves of the defendant upon the dam for the mill. That the witness being about to execute the above orders of the defendant, told the plaintiff that he was about to take away the hands of the defendant from the dam; the plaintiff asked for what, he told him to build his house; the plaintiff told him to continue to work at the dam, and not to mind the house, that he, the plaintiff, could make a shift with the counting room finished in the mill; that in consequence of this request of the plaintiff, he at that time refrained from building the house, and continued working upon the dam until the cold weather prevented him; that he began again to work upon it in the spring 1798, and did not finish it until some short time before the mill was completed, which was on the 21st of June 1798. That the witness was the overseer of the defendant for the years 1797, 1798, 1799. That he never after received any instructions from the defendant to get the logs for the house, and that none were ever got. That at this time the plaintiff was a single man, and that the room in the mill was a large comfortable room, with a fire-place in it. The defendant then proved, that after the mill was completed, the plaintiff occupied the room in the mill, and in conversation with *Peregrine Fitzhugh*, declared to him that the room answered his purposes very well, and that there was no occasion to build the dwelling-house until it suited the convenience of the defendant. The plaintiff offered no evidence to the jury that he ever called upon the defendant to build the dwelling-house, or requested it to be done. That on the 31st of January 1799, the defendant dispossessed the plaintiff of the mill, and kept him out ever after. On these facts the defendant prayed the court to direct the jury, that the plaintiff had no cause of action against him for the alleged breach of covenant in not building the dwelling-house.

Mason and *J. Buchanan*, for the Defendant, cited *Jones vs. Barkley*, 2 *Dougl.* 684, 687; and 1 *Roll. Ab.* 453, N. pl. 5.

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Martin, (Attorney-General,) for the Plaintiff, cited *Littler vs. Holland*, 3 *T. R.* 590.

Chase, Ch. J. The construction of the agreement is a matter of law to be determined by the court. Evidence may be admitted to explain doubtful parts; but no evidence can be admitted to prove the agreement different, or to prove any additional agreement not included in, or touched upon in the agreement.

The court cannot give the direction prayed by the defendant. They are of opinion, that the evidence offered did not dissolve or extinguish the contract in this case, nor bar the plaintiff's cause or right of action, against the defendant, for the breach in not building the house; that it was only a consent to a temporary suspension of the building of the dwelling-house, and is only proper in mitigation of damages. The defendant excepted.

2. It appeared in evidence, that the mill was completed on the 21st of June 1798, and continued in the possession, and under the direction of the plaintiff exclusively, until the 31st of January 1799. That on this last day the defendant dispossessed the plaintiff, and from that time only, withheld from him any share of the profits. That on the 11th of February 1799, the plaintiff instituted this his suit against the defendant. The defendant then moved the court to direct the jury, that when this suit was instituted the plaintiff had no cause of action against the defendant for withholding the profits of the mill.

Chase, Ch. J. At the time of bringing the suit, the plaintiff had a cause of action, being deprived of the benefits under the contract. The court cannot give the direction prayed. The defendant excepted.

3. The defendant then moved the court to direct the jury, that the covenant on the part of the defendant, that the plaintiff should receive one half of the profits of the mill, is dependent on the covenant, on the part of the plaintiff, to take up his residence at the mill, to superintend its management and direction for the joint benefit and advantage of both parties, to commence a copartnership as soon as the mill should be put in motion, and to keep a regular set of books containing all the transactions of the partnership concern; and that the plaintiff, to entitle himself to a

recovery of one half of the profits of the mill, must prove that he performed his covenant in all its parts, or that he was prevented from doing so by the defendant.

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J. Buchanan and *Warfield*, for the Defendant, cited *Jones vs. Barkley*, *Dougl.* 684, 690. *Esp. Dig.* 284, 285; and *Glazebrook vs. Woodrow*, 8 *T. R.* 366.

Chase, Ch. J. The court are of opinion, that the covenant in this case is an independent covenant, and that it is not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with, or fulfilment of, every stipulation in the covenant on his part to be performed. The court therefore refuse to give the direction prayed. The defendant excepted.

4. Upon the rejection of the testimony of the subscribing witness to the agreement as to the ideas of the parties respecting the agreement, and upon the statement in the second bill of exceptions, the defendant prayed the court for their opinion and direction to the jury, that by the true construction of the articles of agreement, the plaintiff was bound to take up his residence at the mill, and superintend the same as miller, and to devote his time and attention to the mill, in such manner as is usual for men under wages to do particular work. That the plaintiff was bound to keep, and prove that he kept, a regular set of books, in which should be contained all the transactions of the copartnership, and that he was bound to effect a settlement of the partnership accounts at the expiration of the year 1798; and that unless he does show that he has done this, or that he was prevented from doing so by the defendant, he cannot sustain an action against the defendant upon this covenant, for dispossessing him of the mill on the 31st of January 1799, and depriving him of the share of its profits from that time.

Chase, Ch. J. The court cannot give the direction prayed. They are of opinion, that it is not necessary for the plaintiff to prove any of the facts above specified, to support this action, except that he did enter upon the management and superintendence of the mill, according to the covenant, and did work and manage the same. The defendant excepted.

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5. The defendant then prayed the court for their direction to the jury, that if they should be of opinion that the plaintiff was entitled to recover from the defendant, for his withholding from the plaintiff the one half of the profits of the mill, that he could only recover therefor from the time when such withholding of the profits first commenced, down to the time when this suit was brought.

The Court gave the direction accordingly.

6. The defendant then prayed the opinion of the court, and their direction to the jury, that for the breach stated by the plaintiff, in turning him out of the mill on the 31st of January 1799, and keeping him out thereafter, he can only recover damages for the actual deprivation of his possession, and the continuance of that deprivation down to the bringing of the suit, and not further; and that for all the subsequent damages which the plaintiff hath sustained for being deprived of the possession and profits of the mill, subsequent to the bringing of this suit, he may have a new action against the defendant, if in doing so the defendant has acted contrary to law.

Mason and *Warfield*, for the Defendant, cited 3 *Blk. Com.* 157; and 1 *Bac. Ab.* tit *Covenant*, 542, 546.

Martin, (Attorney General,) and *Shaaff*, for the Plaintiff, cited *Nurse vs. Barns*, Sir *T. Raym.* 77.

Chase, Ch. J. The court are of opinion, that the plaintiff may recover damages for one half of the nett profits of the mill down to the time of instituting this suit only; and damages for the ejecting and turning the plaintiff out of the possession of the mill, and for all advantages and benefits, which might attend or result from the possession of the same, during the unexpired term of ten years, not comprehended within the nett profits of the mill; and that an action or actions may be brought by the plaintiff against the defendant, for one half of the nett profits which might have been made, or may be made, from working the mill under the contract, from the 11th of February 1799, during the continuance of the partnership under the same. The plaintiff and defendant *both* excepted to this opinion of the court.

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7. The defendant then prayed the court to direct the jury, that in this case the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him; and that this being an action sounding in contract, it was not a case in which it was proper for the jury to give vindictive damages.

Chase, Ch. J. The court are of opinion, that this being an action founded on contract, the plaintiff has only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him, (exclusive of his part of the profits of the mill,) according to the whole of the circumstances existing in the case, as they appear in evidence to the jury, without reference to the force, if any, with which the plaintiff was dispossessed. The plaintiff excepted.

Verdict for the Plaintiff, and damages assessed to £168 15 0 current money. There was a motion *in arrest of judgment*, and the following reason was assigned: Because the plaintiff hath stated in the declaration, as a breach of the covenant, on the part of the defendant, that he did not enclose twelve acres of land most convenient to the mill, in the declaration mentioned, two acres whereof was bottom land, and cause the same to be put under a good and sufficient fence for the exclusive use of the plaintiff; upon which pretended breach of covenant the jury have assessed damages to the plaintiff, when in fact it was the duty, by the articles of agreement, of him the plaintiff, and not of the defendant, to have enclosed said twelve acres of ground at the joint expense of the plaintiff and defendant.

Curia adv. vult.

Upon the abolition of the General Court, this case was transferred to the county court of *Washington*, in which court, at October term 1806, judgment on the verdict was arrested by *Shriver*, A. J. and the plaintiff appealed to this court.

The cause was argued before Chase, Ch. J. Nicholson, Gantt, and Earle, J.

Shaaff, for the Appellant. This case does not come up on any of the bills of exceptions taken at the trial of the

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cause. The sole question for this court is, whether the county court were right in arresting judgment on the verdict. The breaches in the declaration, which have been made the ground for the motion in arrest of judgment, as stated in the reasons filed, are, that "the defendant did not enclose twelve acres of land most convenient to the mill, in the declaration mentioned, two acres whereof was bottom land, and cause the same to be put under good and sufficient fence for the exclusive use of the plaintiff." Now the declaration does not allege the breach as stated in the reasons. The breach, as laid in the declaration, is "nor did the defendant furnish the plaintiff with 12 acres of land, including two acres of bottom land, most convenient to the plaintiff, under good and sufficient fence, for the plaintiff's use, but wholly refused," &c. in the words of the agreement. The meaning of which is, that *Galloway* was to furnish the land enclosed, and that it was not to be at the joint expense of the parties. The preceding clause in the agreement saying, that the firewood, &c. should be at the equal cost of the parties, did not make it a covenant that the 12 acres should be enclosed at the joint expense. They are separate covenants. It is not usual for a man to covenant to furnish himself; and as this was for the benefit of *Morrison*, it must be *Galloway's* covenant. The costs of cutting the firewood, &c. has nothing to do with what follows respecting the land to be enclosed. After verdict, the court are to infer from the expressions in the declaration, that *Galloway* did not, according to the agreement, furnish the land, and enclose it as by the covenant he was bound to do, and that the jury found that he did not furnish and enclose according to the covenant. The declaration does not state at whose expense the enclosing was to be. It was to be done for the use of *Morrison*. The firewood was to be furnished at the equal expense of the parties.

If the judgment is reversed, by the act of 1800, *ch.* 69, this court are to give such judgment as the court below ought to have given. The judgment here has been arrested, and if the judgment of arrest is reversed, unless the court give judgment under this act, the appellant has no remedy but a new action.

T. Buchanan, for the Appellee. The only question as to the construction of the agreement is, whether the land

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was to be enclosed at the joint expense of the parties? The declaration goes upon the ground that the enclosure was to be made solely at *Galloway's* expense, when the agreement does not so provide, but when it may be inferred that it was to be at the joint expense of both, and was to be taken as a mutual covenant. In the agreement, where any act was to be done at the expense of either of the parties, it is so stated. Hence, it not being otherwise provided, the inference is, that the enclosing the 12 acres, &c. was to be at the joint expense of both. The firewood was to be furnished at the joint expense, and the land to be enclosed at the like expense. There is no reason why the expense in the one case should not be borne as in the other. In this case the appellee took a number of bills of exceptions at the trial. He did not let the judgment go against him on the verdict, and rely on the errors in the opinions given in the exceptions, but moved to arrest the judgment, which was done, and the cause is now in this court on the plaintiff's appeal. If the judgment is reversed, and such a judgment given as the court below ought to have entered, the appellee will be precluded from the benefit of his bills of exceptions.

Martin, in reply, was stopped by the court.

JUDGMENT REVERSED, AND JUDGMENT FOR THE APPELLANT ON THE VERDICT, &c.

SMITH, *et al.* vs. THE STATE.

DECEMBER.

By the acts of confiscation, the equitable interests of *British* subjects, in lands in this state, were confiscated without *office found*, or entry, or other act done, and although such equitable interests were not discovered until long after the treaty of peace.

APPEAL from a decree of the Court of Chancery. Bill filed in the name of the state, at the instance and for the use of *Carroll* and *Maccubbin*.

HANSON, Chancellor, decided, that by the act of *October* 1780, *ch.* 45, "to seize, confiscate and appropriate, all *British* property within this state," and the act of the same session *ch.* 49, "to appoint commissioners to preserve confiscated *British* property," the *equitable* interests of *British* subjects in lands were confiscated without *office found*, or entry or other act done, and although such equitable interests were not discovered until long after the treaty of peace between *Great Britain* and the *United States*. [*See the de-*

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cree of the chancellor, as reported in 6 *Cranch*, 286.] From that decree the defendants appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, and GANTT, J. by

Johnson, (Attorney General,) for the Appellants; and by *Ridgely*, for the Appellee.

DECREE AFFIRMED.

The appellants brought a writ of error to the Supreme Court of the *United States*, where the decree of this court, affirming that of the court of chancery, was affirmed. See 6 *Cranch*, 286.

DECEMBER.

THE ATTORNEY-GENERAL VS. JARRETT.

A certificate of survey was returned to the land office for a tract of land called *B J*, surveyed on the 24th of April 1794, for A J. On the 8th May 1797, A J obtained a warrant of resurvey on *W C*, and in his resurvey made on the 1st of May 1798, he included *B J*, and called the land *B S*. On the 10th May 1798, A J obtained a proclamation warrant on his own certificate of the land called *B S*, and had it executed on the 28th April 1799. But D W had, on the 30th Feb. 1799, obtained a proclamation warrant on *B J*, and had it executed on the 22d of May 1798, and called the land *B C*. A J paid the composition money on *B S* on the 8th of May 1799, and D W paid the composition money on *B C* on the 9th of May 1799. Both certificates were caveated by the opposite party; and the patent of the land office ordered a grant to issue to A J for the land called *B S*. To vacate which grant a bill was filed in the court of chancery, in the name of the attorney general, at the relation of D W. *Decreed*, that the bill be dismissed.

APPEAL from a decree of the Court of Chancery *dismissing* the bill of complaint which was brought in the name of the *Attorney-General*, at the relation of *West*, to vacate a grant obtained by *Jarrett* for a tract of land called *Belgrade*. The facts in the case were these: *The Relator's title*—On the 19th of *May* 1794, *A. Jarrett* returned a certificate of survey to the land office, for the land called *Belgrade*, (the first,) containing 1089 acres. On the 20th of *February* 1798, *West* obtained a proclamation warrant thereon, no person having proclamated the certificate. On the 22d of *May* 1798, *West* returned a certificate, under his proclamation warrant, and called the land *The Buckskin*, containing 228 acres. On the 9th of *May* 1799, the composition money was paid by *West*. On the 3d of *June* 1799, *West's* certificate was caveated by *A. Jarrett*. On the 10th of *February* 1800, the judge of the land office, on a hearing of the caveat, passed an order for correcting the certificate, by excluding part of a tract of land called *Johnson's Enlargement*, which appeared to be included in the certificate of *The Buckskin*. On the 30th of June 1800, a corrected certificate was returned by *West*, containing 200 acres, excluding 28 acres, part of *Johnson's Enlargement*. On the 10th of *October* 1800, the corrected certificate was caveated by *J. Jarrett*, the defen-

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dant; and on the 20th of *April* 1801, the judge of the land office ruled the caveat good; and a grant was refused to *West*, because the land was included in another certificate, and granted to the defendant by the name of *Belgrade*, (the second.) This certificate of *Belgrade*, (the second,) the relator alleged was younger than *West's*, and that the grant was obtained thereon during the contest under the caveats. That the defendant had notice of *West's* certificate.

The Defendant's title—On the 1st of *May* 1798, *A. Jarrett* returned to the land office another certificate of survey for *Belgrade*, (the second,) containing 767 acres, under a warrant of resurvey issued on the 8th of *May* 1797, to resurvey *Wild Cat Den*. On the 10th of *May* 1798, *A. Jarrett* proclamated his own certificate for *Belgrade*, (the second.) On the 29th of *April* 1799, *A. Jarrett* returned a certificate under the proclamation warrant, and called the land *Belgrade*, (the second,) containing 92 acres, excluding the rest. On the 8th of *May* 1799, *A. Jarrett* compounded on this last certificate. On the 30th of *September* 1799, the certificate was caveated by *West*. On the 10th of *February* 1800, the judge of the land office *dismissed* the caveat of *West;* and on the 20th of *October* 1800, a grant issued on the certificate to the defendant, he having obtained an assignment thereof from *A. Jarrett*. The bill prayed that the grant for the land called *Belgrade*, issued to the defendant, might be vacated, and for further relief, &c.

Hanson, Chancellor, *(February* term 1805,) *Decreed*, that the bill of complaint be *dismissed*, but without costs. From this decree the complainant appealed to this court.

The case was argued at June term 1808, before Polk, Buchanan, Nicholson, and Gantt, J. by

Hall and *T. Buchanan*, for the Appellant; and by

Johnson, (Attorney-General,) for the Appellee, and was reargued at the present term before Chase, Ch. J. Buchanan, Gantt, and Earle, J.

T. Buchanan, for the Appellant, cited *Land Hold. Ass.* 186, 275, 359, 362, 319, 361, 469; and the act of 1785, *ch.* 88, *s.* 10.

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Martin, and *Johnson*, (Attorney-General,) for the Appellee, cited *The Attorney-General vs. Snowden*, 1 *Harr. & Johns.* 332.

DECREE AFFIRMED.

DECEMBER.

WILLIAMS vs. HODGSON.

Whether or not the answer of one of the defendants to a bill in chancery, is evidence against another defendant?

A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity

Ignorance of the law, as to the consequences of a creditor's accepting the bond of one of the partners for a simple contract debt, due from the partnership, is not a ground for relief in equity

Such a bond, although not binding on the partner who does not execute it, is obligatory on the one executing it

A complainant is not entitled to relief in chancery against the executors of a joint obligor, who was a surety in the bond. Per *Hanson*, Chan. *(note)*

APPEAL from a decree of the Court of Chancery. The bill, which was filed by the appellee against *Williams*, (the appellant,) and *John Clarke*, stated that *Williams* and *Clarke* entered into partnership under the name of *John Clarke*, & Co. During the partnership, *Clarke* bought goods from the complainant, *(Hodgson,)* which were delivered to *Clarke* on account of the partnership, and by him sold. That the belief that *Williams* was a partner, gave credit to the firm. That on the 7th of July 1797, *Clarke* settled with the complainant, and the concern was found indebted £319 0 5, *Virginia* currency; and for that sum *Clarke* gave bond to the complainant, in the names of *Clarke* and *Williams*, (jointly and severally,) executed by *Clarke* alone, signed *John Clarke*, & Co. That *John Clarke*, & Co. being afterwards indebted to the complainant in $398 34, and interest, for goods sold to *John Clarke*, for and on account of the concern, *Clarke*, for himself and *Williams*, on the 18th of November 1797, gave another bond to the complainant, signed *John Clarke*, & Co. That *Clarke* is insolvent, &c. That suits were brought on the bonds in the general court against *Williams*, and were *non prossed*, because that court were of opinion that one partner could not execute a bond, so as at law to bind his copartner, unless a special authority for such purpose existed. *Prayer* for a disclosure from the defendants, whether they were partners or not, and that they may be compelled to account with and pay the money due to the complainant, and for other relief, &c. The *answer* of *Williams* stated, that he and *Clarke* entered into partnership in October 1795, for three years, in the milling and distilling business. *Clarke* was directed not to purchase merchandize on *Williams's* account, and he believes that *Clarke* sold goods on his own account. He does not know whether or not *Clarke* bought goods on the partnership account, and if he did, the answer insisted that the defen-

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dant was not liable. That he knew nothing of the settlement or execution of the bonds. That suits were brought on the bonds, and *non prossed*, as stated in the bill, and that *Clarke* was insolvent. That the partnership was dissolved in 1798. *Clarke* was the acting partner; and the defendant never bought any goods for the partnership, and he does not know the consideration of the bonds.

Testimony was taken under commissions issued for that purpose.

The *answer* of *Clarke*, put in after all the proof was taken and returned, admitted all the facts alleged in the bill.

Kilty, Chancellor, (February term 1806.) The objects of the bill, as stated therein, were to have a disclosure from the defendants, whether they were partners; to compel them to account with the complainant, and pay the money due as charged in the bill, on account of goods sold to them, and to obtain other relief.

As a ground for relief, the complainant states, that during the continuance of the partnership, *Clarke* gave a bond to him in his own name, and that of *Williams*, for a balance due on account of goods sold to them, and afterwards another bond was given on a similar account, on which suits were brought against *Williams* in this state, and *non prossed*, on the ground of such bonds not binding him at law.

The answer of *Williams* denies the partnership to the extent alleged by the complainant, and does not admit the purchase of the goods by *Clarke;* the settlement or execution of the bonds. It admits that *Clarke* is insolvent, and that suits were brought on the bonds, and *non prossed* as stated in the bill.

The defence set up is, that the remedy, (being for the price of goods sold,) is at law, and that it is not a case for relief in equity, and that the bonds relied on as a ground of relief by the complainant, are not proved. And it is also contended that an issue should be tried as to the partnership, &c. and that the question of law should be submitted to the judges.

The counsel for the complainant relies on the facts disclosed in the case, to support the jurisdiction and the re-

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lief prayed for; and also contends that the demand being against the defendants as partners, gives the court of equity a concurrent power with a court of law; and so as to the prayer for a discovery.

Upon this question of jurisdiction, the case is attended with considerable difficulty, and the authorities on the subject have been carefully examined with a view to its decision.

The position laid down by the complainant is certainly too broad. A prayer for a discovery, which is made a part of every bill in calling on the defendant to answer, cannot give a jurisdiction in every case, nor can the circumstance of the defendants being partners give such jurisdiction in a case purely determinable at law.

If therefore the complainant had merely stated a sale, and delivery of goods, and had brought his bill to recover the price, or if instead of a bond, a note unsealed had been given by *Clarke*, the complainant would not have been so ill advised as to have prayed for relief in this court, or if he had, would have failed to obtain it.

But there are circumstances in this case which, under the principles recognized by courts of equity, incline the chancellor to think that the jurisdiction may be sustained.

It is certainly desirable that the boundaries between the courts, as to their jurisdiction, should be prescribed, but they are not in all cases to be clearly discovered, and a writer of eminence observes, that "to strike out the distinguishing principle upon which courts of equity in such cases have proceeded, would be indeed extremely useful, but that after having given considerable attention to the subject, he found himself incapable of reconciling the various decisions on it."

In addition to the maxim, that matters of *account*, *fraud*, *accident* and *mistake*, are proper objects of a court of equity, there are other principles which require to be considered in viewing this case. Although a court of equity will not generally give relief where the party has a remedy, or the matter is properly determinable at law, yet to prevent such relief, it must be a case which can be fully investigated, and receive a complete and effectual decision in a court of law, and the remedy there must be clear and certain.

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In many cases a court of equity will exercise jurisdiction although a remedy might be had in a court of law.

There are some cases in which, although the complainant might have a remedy at law, a court of equity having obtained jurisdiction for the purpose of discovery, will retain the suit for the purpose of giving relief; and if this rule was more general than it is, it would only be an extension of the principle in bills for account of assets, which are stated to have been originally only bills for discovery, which could not be had without an account, but on which the courts of equity have made complete decrees, and given the party his debt likewise.

Equity jurisdiction is exercised to put a bound to vexatious and oppressive litigation, and to prevent a multiplicity of suits.

It is exercised where the courts of ordinary jurisdiction are made instruments of injustice.

A court of equity will lend its aid whenever by fraud or accident a person is prevented from effectually asserting, in the courts of ordinary jurisdiction, rights founded on principles acknowledged by those courts, and where parties by contract have given a right, but have not given a sufficient remedy, and in the case of defective securities for money.

The present case may not perhaps come under the scope of all these principles, but there are some of them which appear to be applicable to it.

Without stating particularly the evidence in the cause, the chancellor is satisfied of the existence of the partnership, as alleged by the complainant, and of the liquidation of the balance due for the goods sold, the execution of the bonds as stated, and the event of the suits on them. With regard to the answer of the defendant, *Clarke*, it is considered, that the partnership being proved by other testimony, his admissions are evidence in the same manner as his acts would be in the exercise of the joint business of the firm. And it may here be observed, that the responsibility of one partner for the acts of another, is not, as stated by the defendants' counsel, a principle of *skeer* mercantile law, but is founded in justice and necessity, and is inseparable from the nature of partnership transactions.

It appears that *Clarke* executed the bonds with a view of ascertaining, and perhaps of securing in some degree, the balance due for goods sold to the company; and these bonds

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were taken by the complainant from a *misapprehension* or ignorance of their legal effect.

If notes had been given by *Clarke*, without seal, as in the case of *Riddle(a)*, and the partnership had been proved, they would have been obligatory on the defendant, *Williams*, at law. The bonds cannot be considered in equity as less solemn and obligatory than the notes, but the remedy sought for on the bonds was defeated by what was indeed a *sheer* principle of law. For if it be proved, as the chancellor conceives it to be, that the defendant, *Williams*, was liable, and might have been bound by notes, without seal, for the same amount, the defence set up to the bonds was not an equitable or conscientious one.

In this respect then the court of law, or (as expressed in one of the principles above stated,) the court of ordinary jurisdiction, has been made the instrument of injustice. By the *accident*, as it may be termed, of the balance due being secured by bonds, the complainant was prevented from asserting in a court of law the right of recovering money due to him on principles acknowledged by all courts.

The parties who purchased the goods have, by the authorised acts of one of them, given (by their contracts,) a right to the money admitted thereby to be due, but have given a remedy insufficient at law, by securities, in that respect, defective.

It is alleged, by the counsel for the defendants, that the complainant, if the money is due to him, has a full and adequate remedy at law; and to prove this, he contends that the bonds are not an extinguishment of the original contract. If the bonds were obligatory on *Clarke*, (which seems to be admitted,) it is difficult to say how the original contract, which was a joint one, remains unimpaired, or how *Clarke*, if solvent, would be liable on both.

If an absolute decision on this question was necessary, it would appear consonant to reason that an unliquidated claim, sounding in damages, would be extinguished by the acceptance of an instrument of a higher nature, which fixed the amount. But supposing this to be left in doubt, has the defendant succeeded in showing that the complainant's remedy, (supposing him entitled,) would be *clear* and

(a) He brought a suit at law on such a note executed by *Clarke* & Co. against *Williams*, and recovered judgment.

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certain in a court of law, or that it would there be fully investigated, and receive a complete and effectual decision?

If equity jurisdiction may be exercised to put a bound to vexatious and oppressive litigation, and prevent a multiplicity of suits, it is not necessary to send a party to a court of law, where the remedy, if to be attained, would be the same; and in this case it may be inferred from the evidence of *J. Riddle*, that if instead of bonds, notes unsealed had been given, the same recovery would have been had as in *Riddle's* case. And the same principle, in addition to the discretionary powers of this court, will account for the chancellor's not applying to a court of law, as was suggested by the defendants' counsel.

The complainant has already tried his remedy at law, which has failed, as much at least through the fault of the defendants as his own; and it is not clear but that a suit in this court might have been originally sustained on the ground of *Williams* not being bound in law by the bonds, though in that case the opinion of the court or the judges, as to the law, might have been resorted to.

In the case of a joint bond it is a constant practice, in case of the insolvency of the surviving obligor, to commence a suit in chancery against the representatives of the other party; and although this arises in part from the acknowledged jurisdiction, as to administrators, &c. yet it is grounded also on the situation of the parties rendering the remedy of the law ineffectual.

With regard to the part of the bill praying for a discovery, it may be further observed, that as the binding of *Williams*, by the bonds of *Clarke*, is alleged to have depended at law on the assent of *Williams*, an acknowledgment of such assent might have been expected by the complainant on filing his bill, which might have been a reason for filing it.

The chancellor has stated his reasons at greater length than may be usual or necessary in such cases, on account of the doubts which he entertained at the trial. These doubts have been removed by the further consideration which he has given to the subject; and his opinion is grounded on the principles which he has stated, and on his determination, that where the merits appear to be with the complainant, he will not dismiss a bill on an allegation of the

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want of jurisdiction, or any other similar objection, unless it is clearly and positively established. *Decreed*, that the defendants pay to the complainant the sum of £1023 15 6 current money, with interest thereon, &c. and the costs of this suit. From this decree the defendant, *Williams*, appealed to this court.

The cause was argued before Chase, Ch. J. Buchanan, Gantt, and Earle, J.

Shaaff and *Magruder*, for the Appellant, contended, 1. That there was no legal proof of a partnership between the appellant and *Clarke*. 2. That if the appellee had any right to recover against the appellant, his remedy, from the proof in the case, was at law, and not in equity; and 3. That the appellee had no right, either at law or in equity, to recover against the appellant.

On the *first point* they contended, that the answer of one defendant was not evidence against another defendant, and cited 1 *Harr. Chan. Pr.* 36, 41.

On the *second point*, they cited *Dorsey's Ex'x. vs. Dorsey's Ex'rs. (a)*. They also contended, that there was not

(a) The case of *Dorsey's Ex'x. vs. Dorsey's* Ex'rs. in the court of chancery at February term 1794, appears to be this: R. T. with J. D. his surety, executed their joint bond to E. D. in 1758, payable in 1769, and in 1788 a joint suit was brought against them at law upon the bond. During the pendency of the suit, J. D. died, his death was suggested, and judgment by confession was rendered against R. T. in 1790. The suit continued against J. D. and in 1791 it was entered *abated*. R. T. obtained a discharge under the insolvent law in 1788, and his trustee sold property belonging to the insolvent, on a credit, more than sufficient to pay all his debts. R. T. was always able to pay the debt sued for, until and after 1786, but no measures were taken for its recovery until the above suit was brought. The executors of J. D. had fully administered and paid away all the assets of the deceased; but they had notice from E. D. and a demand of payment was made of them within one year after the death of J. D. A bill was filed in chancery in 1792, by E. D. (and on his death revived in the name of his executrix) against the executors of J. D. to be paid the debt due on the bond. The defendants, among other things, in their answers, relied upon the act of limitations.

Hanson, Chancellor. On every application to this court, not grounded on positive law, when it appears, that no former decision is in all points applicable to the present case, the principles, on which the court was originally instituted, are to be considered. Its jurisdiction, from the beginning, has been exercised in preventing men from taking unconscientious advantages of law, in obliging them to discharge trusts, and to perform reasonable engagements of every kind, either express or implied, and in relieving against fraud, or accident. But it never yet has been the professed business of this court to compel men to do that, which neither they,

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sufficient proof of the execution of the bonds stated in the bill; that the originals ought to have been produced. *Peake's Evidence*, 96. *Wymark's* case, 5 *Coke*, 74. 2 *Com. Dig.* tit. *Pleader*, (P. 1). *Harper vs. Hampton*, 1 *Harr. & Johns.* 710; and *Desobry vs. Terrier*, *(ante* 219*)*.

On the *third point* they contended, that the execution of the bonds extinguished the simple contract debt, both as to *Williams* and *Clarke*. They cited *Bac. Ab.* tit. *Release*, (G.) *Bull. N. P.* 155. *Chitty's Plead.* 155. *Clement vs. Brush*, 3 *Johns. Cas.* 180. *Pierson vs. Hooker*, 3 *Johns. Rep.* 70. 4 *Vin. Ab.* 387. 1 *Fonbl.* 117, *(note.)* 2 *Com. Dig.* tit. *Chancery*, 476, 330, 331; and *Tom vs. Goodrick*, 2 *Johns. Cas.* 213.

nor the persons whom they represent, have engaged to perform, which the positive laws of the land do not enjoin, and which equity and good conscience do not demand. In some cases, indeed, which did not appear to come under known established principles, or to be embraced by former decisions, chancellors have exercised their ingenuity in raising agreements by construction; provided nevertheless, that the performance of the thing, thus supposed to be contracted for, might fairly and reasonably be demanded. Hence it is that the condition of a bond to pay money has been construed an agreement, which equity ought to enforce, after the obligor has been discharged from the penalty at law. How far the first decision in such case was right, is perhaps questionable; for this plain reason, that the obligor was not, and could not be apprized of the power, which equity would afterwards assume, of compelling him to do that, which he never in any manner contracted to perform; the operation of a joint bond at law being this, that during the life of both obligors it is binding on both, and, after the death of one, the obligee can have recourse to the other only. However, the determination in the case of *Bishop and Church*, 2 *Ves.* 371, cited by the counsel on each side, must now be recognized as a law or rule for this court; and whether that case applies sufficiently to the present is to be examined.

The two cases appear to agree in every point, except one; but that one point, in which they differ, is important. In the former case, executors of a joint obligor were called on to pay money lent to the testator and the other obligor, who were partners in trade, and the constructive agreement of the testator, was on a substantial consideration. But, in the present case, the executors are called on to pay money which never was, or intended to be, participated by their testator. The constructive agreement therefore, on which alone this court could decree against them, was voluntary, and such as, without special circumstances, ought not to be enforced. What then are the special circumstances of this case? To say nothing of the lapse of time, and the neglect of the complainant. He has it still in his power to obtain the debt from the trustee of the surviving obligor. In short, it appears to the chancellor, that a decision in favour of the complainant would go far beyond any former determination, and that former determinations, with respect to joint obligors, have gone quite far enough. On the point relative to the act of limitations, it is not necessary to decide—*Decreed*, that the bill be *dismissed*.

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Key, and *Johnson*. (Attorney General,) cited *Watson on Part*. 40, 337, 458. *Higgins's* case, 6 *Coke*. 46. *Abbott vs. Smith*, 2 *W. Blk. Rep*. 950. *Maddox vs. Jackson*, 3 *Atk*. 406. *Darwent vs. Walton*, 2 *Atk*. 510; and *Blk. Com*. 486.

Chase, Ch J. delivered the opinion of the court. The court have considered the bill, answer and proof, in this case, the arguments of counsel, and the decree of the chancellor; and admitting the proof to be sufficient to establish a partnership between *Williams* and *Clarke* in the extent charged in the bill, in opposition to the answer of the defendant, and admitting also that the bonds mentioned in the bill, as executed by *Clarke*, under the signature of *Clarke & Co*. have been fully proved, it appears to the court that the complainant is not entitled to any relief in equity, and that the decree of the court of chancery ought to be reversed.

It is a principle recognised by the courts of law and equity, that a bond given by one partner for a simple contract debt due from the partners to the creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt.

It is also established by the courts of law and equity, that ignorance of the law, as to the legal consequences resulting from such a bond, cannot excuse or form a ground for relief in equity, on the suggestion and proof that the party was mistaken as to the legal effects of such a bond, imagining at the time that it could not operate as a release to the other debtor, and that his responsibility still existed.

The court are also of opinion, that the bonds set forth in the bill, although not binding on *Williams*, are obligatory on *Clarke*.

On these grounds the court decide, that the decree of the court of chancery ought to be reversed.

Buchanan, J. I consider the partnership, alleged in this case to have existed between the defendants below, as sufficiently established to the extent charged in the bill, and that the delivery of the goods and merchandise, said to have been sold to *Clarke*, as acting partner, is fully proved.

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But if the bonds charged in the bill to have been passed by *Clarke*, in behalf of *Williams* and himself, were executed by him for the amount of those goods, the simple contract debts were not thereby severed, and continued open as to *Williams*, and destroyed as to *Clarke*, (on whom such bonds would be obligatory;) but being respectively joint, they became in law extinguished as to both. And though equity will interpose its aid where a remedy is wanting at law, the demand continuing, yet it cannot revive a debt which in law is extinguished.

If, however, such a bond could be construed to extinguish a simple contract debt as to the party signing it only, leaving it open as to the other partner for the interposition of a court of chancery, yet in this case the complainant has failed in proof to lay a foundation for a decree against *Williams*; for, as against him, the bonds in question which are set up in the bill as the very ground of the relief prayed, are not proven by any legal evidence exhibited in the record; and it cannot be seriously contended, that in the absence of such proof, the chancellor could hold jurisdiction over the case; for if no such bonds were executed by *Clarke*, the simple contract debt remains unimpaired, and the proper remedy is in a court of law.

Upon the whole, I am of opinion that the chancellor's decree, however consonant to strict justice, ought to be reversed.

DECREE REVERSED.

HALL VS. GRIFFITH.

DECEMBER.

An administrator must comply with an order of the orphans court directing a sale of the personal estate of the deceased for the payment of debts, and cannot retain the property at the appraised value, on paying the debts out of his own funds to the amount of the appraisement.

After payment of the debts of the deceased, and all legal costs and charges attending the administration, the administrator must deliver over the residue of the personal estate specifically to the representatives of the deceased.

Where an administrator retained a part of the personal estate of the deceased, at the appraised value, and sold a part for the benefit of the estate, and a part as his own property—*Held*, that he must account for the increase of the slaves, and for the use, labour and hire, of all slaves retained or hired by him; and where one of the slaves had run away, he must account for such slave at the appraised value, unless he used all reasonable endeavours to regain possession of such slave. He is to be allowed for money expended in clothing and maintaining such of the slaves as were unable to work, and in bringing up, clothing, &c. the increase of slaves, so long as they continued a charge. Also for all debts paid; for his commission, and all legal costs. He is to be charged with the amount of the inventory; with the sum gained on the sales of the property, and with the debts received.

APPEAL from a decree of the Orphans Court of *Harford* county. *Griffith*, (the appellee,) together with his wife *Cordelia*, since deceased, representatives of *John B. Hall*, deceased, by their libel, exhibited on the 18th of Septem-

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ber 1805, alleged to the orphans court that *Aquila Hall*, (now appellant,) the administrator *D. B. N.* of *John B. Hall*, had made sales of sundry slaves, and other articles, belonging to the estate of the deceased, and had never accounted for the amount of the sales, but only for the amount of the appraisement. That the sales greatly exceeded the amount of the appraisement. That he retained in his hands sundry articles belonging to the estate, and has had the use, profit and labour, of sundry of the slaves, for which he never accounted. That sundry of the slaves have had increase, which remain in his possession unacounted for. *Prayer* for an account, &c. *Hall*, by his answer, stating that he was appointed administrator *de bonis non* of *John B. Hall*, some time in the year 1790, admitted, that before he obtained an order from the orphans court for that purpose, he had sold sundry articles liable to waste, &c. on a credit, amounting, according to the appraisement, to £79 8 1, and according to the sales to £93 19 6, a part of which he had not received, owing to the insolvency of the purchasers. He admitted that he received sundry slaves, and other articles, as stated in the inventory, amounting to £723 2 4. That he obtained an order from the orphans court to sell as much of the property as would pay the debts of the deceased, and it was understood, between the court and him, that it was discretionary to sell or not, owing to the difficulty of selling property at that time for cash, and the order did not authorise him to sell upon credit. That he sold some of the slaves, and if he had sold all the property in the inventory for cash, it would not have discharged the debts of the deceased; and under that impression, and to save the real estate from being sold, he paid the debts out of his own money, and retained the personal property for the same. That upon settlement of his accounts with the orphans court, they would not allow him to charge the estate with any interest, after 18 months, from the date of his letters of administration, although he paid considerable sums of interest after that time. That one of the slaves had run away. That he had paid, and been allowed by the orphans court, debts and commissions to a considerable amount more than the appraisement, viz. £820 16 11. He admitted the increase of some of the slaves, and that such increase was in his possession. That he was at considerable expense in supporting old, infirm

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slaves, and in bringing up, maintaining and clothing, the increase; and that he had since sold sundry of the slaves as his own property. The orphans court decreed, that *Hall* ought to account for the sales of such part of the estate of the deceased as he had already sold, and that the residue of the estate, as contained in the inventory returned, he could not retain and keep at the appraisement, but that he ought to pursue the order of the court of the 9th of August 1791, which directed him to sell so much of the personal estate of the deceased, as might be sufficient to pay the debts. From this decree *Hall* appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, NICHOLSON, GANTT, and EARLE, J. by

Martin, for the Appellant; and by

Johnson, (Attorney General,) for the Appellee.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that the appellant, as administrator *de bonis non* of *John B. Hall*, ought to have sold at public sale, pursuant to the order of the orphans court made on the 9th of August 1791, as much of the personal estate of the deceased as would have been sufficient to discharge and satisfy all the debts of the deceased, and all legal costs and charges attending the administration, and ought to have delivered over the residue of the personal estate, specifically to the representative of the deceased, the libellant in this suit; that the appellant had no right to retain the personal estate at the appraisement, on his paying the debts of the deceased to the amount of the appraisement. That the appellant account for the increase of the negroes, and for the use, labour and hire, of all negroes retained or hired out by him, and that he account for negro *Corbin*, (who ran away,) at the appraised value, unless the orphans court shall be satisfied that the appellant used all reasonable endeavours to regain possession of that negro. That he be allowed all sums of money necessarily expended by him in clothing and maintaining such of the negroes, named in the inventory, as were not able to work and maintain themselves, and in bringing up, maintaining and clothing, the increase of any of the negroes, so long as they continued a charge. That he be allowed all sums of money

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paid by him to the creditors of the deceased, his commission, and all legal costs and charges. That he be charged with the amount of the inventory, exclusive of the negroes—with the sum gained on the sales thereof; with the amount of the negroes sold; with debts received by him; and that an account be taken and made out in conformity to the principles and directions herein stated. That the appellant proceed to sell at public sale, for cash, as much of the personal estate as may be necessary to defray and satisfy any balance which may be due to the creditors of the deceased, and the appellant, on a settlement to be made pursuant to the principles aforesaid.—*Decreed*, that the decree of the orphans court be reversed, and that that court proceed, without delay, to compel the appellant, as administrator *de bonis non* of *John B. Hall*, to settle the estate in conformity to the principles set forth herein, and that the appellant deliver over to the appellee, the negroes which may remain in his hands after settling the estate in the manner above directed; and that the appellant pay to the appellee the costs by him incurred in this court.

DECREE REVERSED, &c.

DECEMBER.

Where a bill was filed in chancery, to set aside and annul a decree before obtained by the defendant against the complainant, on the ground of fraud practised by the defendant in obtaining that decree, there appearing to be no evidence of fraud, the bill was dismissed, *but without costs*. On an appeal to the court of appeals by the *complainant*, that court *affirmed* so much of the decree as dismissed the bill, but *reversed* that part of it which directed that the dismissal should be *without costs*, and decreed that the appellant pay to the appellee his costs incurred in both courts.

HOFFMAN vs. BAKER.

APPEAL from the Court of Chancery, *dismissing* the bill of the complainant, (now appellant,) which was filed on the 5th of April 1802. The object and nature of the bill is stated in the decree.

KILTY, Chancellor. (July term 1806.) The object of the bill, as stated therein, and in the arguments of the counsel, is to set aside and annul the decree heretofore obtained by the defendant against the complainant, in this court in October 1801, on the ground of fraud practised by the defendant in the obtaining that decree.

It becomes necessary therefore to examine how far this allegation is supported by the evidence in the present suit. This consists of the plot returned, by which the complainant contends, that it appears the locations of the lands in controversy are different from what they were represented to be in the former case. But this circumstance, supposing it to be clearly established, does not amount to a proof of fraud as to the former decree. One part of the testi-

mony, admitted in the former case, was the deposition of *John Foster*, which the complainant alleges was repugnant to the truth; and another was the certificate of *Bell*, as an assistant surveyor to *Gist*, which the complainant states was agreed by his counsel to be admitted as evidence upon the false suggestion of the defendant. Of this fact there appears to be no proof; and although fraud may be inferred from a variety of circumstances combined together, it is not to be presumed merely because the fact may on the present proof be different from what the evidence, admitted through mistake, showed it to be.

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It is not necessary or proper to go into the former decree on the evidence then produced, and it must stand, unless it can be set aside according to the known and established principles of this court. *Decreed*, that the bill of the complainant be dismissed, *but without costs*. From this decree the *complainant* appealed to this court.

The cause was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EARLE, J. by

Johnson, (Attorney-General,) for the Appellant; and by

Shaaff, for the Appellee.

THE COURT decreed, that so much of the decree of the court of chancery as *dismissed* the bill of complaint of the complainant be *affirmed;* and that that part of the decree which directs that the dismissal of the bill should be without costs, be *reversed;* and decreed that the appellant pay to the appellee all the costs incurred by the appellee in the court of chancery, and in this court.

DECREE REVERSED, &C.

SINGERY VS. THE ATTORNEY-GENERAL. DECEMBER.

APPEAL from a decree of the Court of Chancery. The bill filed in the name of the *Attorney-General*, at the re-

Where a court of law admitted evidence to prove that a certificate of survey was forged, such evidence could have been deemed admissible only on the ground, that if the certificate was proved to be forged, the grant obtained on it was fraudulent, and could have no operation in law to pass the land to the grantee.

Fraud may be inquired into as well at law as in equity: and where frauds are clearly established, the courts of law and of equity have concurrent jurisdiction.

Where the fact of the forgery of a certificate of survey, under the grant on which the defendant claimed, came before the court and jury collaterally, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy, the verdict in favour of the defendant, cannot be received as evidence to prove that the certificate was not forged.

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lation of *Ezekiel Boreing*, on the 19th of November 1799, stated, that in the year 1770, the surveyor of *Baltimore* county, being directed by the commissioners of the Lord Proprietary to survey and lay out, for any persons that might apply to him, any part of the *Reserve* land in that county, to enable them to contract with the commissioners for the purchase of such land, *James Calder*, as surveyor of the county, by virtue of the power and authority from the commissioners, did, on the 30th of September 1770, survey and lay out for *Singery*, (the appellant,) a tract of land in the *Reserve* called *Singery's Trouting Streams*, containing 178 acres, and included within the courses and distances described in a certificate of the courses, taken from the original entry in the surveyor's books, &c. "Beginning at two bounded white oaks standing between two barren hills, at the end of the last line of a tract called *Merryman's Mountain*, (included,) and about W 9 perches from *George's* Run, and running thence," *(nineteen courses and distances, without calls,)* "and thence with a straight line to the beginning, containing 178 acres, and called *Singery's Trouting Streams*. September 30th 1770." That the certificate made out by *Calder*, as surveyor of the county, for *Singery's Trouting Streams*, to be returned to the land office, corresponded in all respects with the record of the courses kept by the surveyor himself as above described, but that *Singery* combining, &c. how to impose upon and defraud the Proprietary out of his land, and the purchase money which he would otherwise be entitled to, returned to the land office a certificate of the courses of *Singery's Trouting Streams* different from that which was made out by the surveyor, as will more fully appear by the certificate and plot of the land recorded in the land office. That in the true and genuine certificate of *Singery's*

The court not having directed the jury that if they found the certificate forged, that nothing passed by the grant, it may be questioned, whether the verdict could conclude the plaintiff if the fact of forgery had been directly in issue.

On a bill in chancery for vacating a certificate of survey and grant, on the ground of fraud, committed by a forgery of the certificate—*Held*, that the court of chancery had jurisdiction although the question of forgery of the same certificate had, in an action of ejectment between the same parties come collaterally before a court of law and jury, and although that court admitted evidence to establish the forgery, and the jury gave their verdict in favour of the defendant, who claimed under the certificate alleged to be forged.

Although on a bill in chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet that court has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant, &c. from whence the injury has arisen, or will make such decree as the circumstances of the case render necessary.

The forgery of a certificate of survey, and the fraud consequent thereon, being fully established, *Decreed* by the court of chancery, that the defendant, claiming under such certificate and the grant thereon, should convey to the complainant all that part of the land held by the defendant under such grant, and which is comprehended in the lines of the tract of land granted to the complainant.

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Trouting Streams, there is no call for "the beginning trees of *Petticoat's Loose*," but that the certificate returned to the land office by *Singery*, has this expression, which the relator expressly states was forged and inserted by *Singery* for the purpose of extending the twelfth line of the tract, and thereby taking in more land than he was entitled to. That by the certificate, as made out by *Calder* before mentioned, *Singery's Trouting Streams* is made to contain 178 acres, but that by the certificate returned to the land office by *Singery*, that tract, by virtue of the call above mentioned, contains 560 acres, as *Singery* contends, though the certificate expresses only 178 acres, as will appear by a plot of the land exhibited, and which was made out and returned by the surveyor of *Baltimore* county to the general court, in an action of ejectment therein depending for the land between the relator's lessee and *Singery*. That *Singery*, on the 20th of April 1775, obtained a patent on the said forged certificate, and thereby got 382 acres of land more than he was entitled to, or compounded for with the Proprietary, or his agents. That by virtue of two special warrants obtained from the land office in the year 1793, the relator had surveyed for him, by the surveyor of *Baltimore* county, 300 acres of land, called *Boreing's Habitation Rock*, and returned a certificate thereof, and that afterwards, on the 24th of April 1795, a patent issued to him for the same. That the land taken up, and paid for by him, called *Boreing's Habitation Rock*, is claimed by *Singery* under the false and forged certificate and patent thereon, as will fully appear by the plot before referred to; and that *Singery* has possession of the land, and holds it as being within the lines of *Singery's Trouting Streams*. But the relator expressly charges, that he has instituted an ejectment in the general court against *Singery* to recover the land, and obtained a verdict and judgment in his favour, from which decision *Singery* has appealed to the court of appeals*(a)*; and he is apprehensive that the said impositions and forgery will be productive of endless controversies and disputes between him and *Singery*, unless it can be corrected by this court. That by the plot returned to the land office, with the certificate on which the patent issued, it is obvious that *Singery's Trouting Streams*, (which included two old surveys, namely *Petticoat's Loose* and

(a) Vide 4 *Harr. & M'Hen.* 398.

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Merryman's Mountain and a very small piece of vacancy,) could not contain more than 178 acres, as mentioned in the certificate, because by the plot it appears that *Petticoat's Loose*, and *Merryman's Mountain*, were almost contiguous and adjoining tracts, and there was only a small vacancy between them; but by extending the twelfth line of *Singery's Trouting Streams* to the surreptitious "beginning trees of *Petticoat's Loose*," as now contended for by *Singery*, there will be created a vacancy of 382 acres between the two tracts, which the relator contends is not the fact, but that it is an imposition in *Singery*. That at the time *Singery's Trouting Streams* was surveyed, there was a rule or law of the land office prohibiting the surveyors from expressing calls in any certificates of surveys made by them under any warrant from that office; and that the call in the certificate of *Singery's Trouting Streams*, is in direct violation of that rule, as will appear by recurring to the rules of the land office, and by the deposition of *Calder*, the surveyor, now filed. *Prayer*, that the certificate and patent of *Singery's Trouting Streams* may be vacated, or corrected, so as to exclude the call, and restrict *Singery* to the courses and distances specified in the certificate, and for further relief, &c. The *answer* of *Singery*, the defendant, states that commissioners were appointed by the Lord Proprietary to make sale of his reserved lands, or of parts thereof, and the defendant being in possession of two surveys within the reserves of *Baltimore* county, the one called *Merryman's Mountain*, and the other called *Petticoat's Loose*, purchased the same of the commissioners, and he believes the two parcels of land were reduced into one entire tract under the authority of *Calder*, but not by him, for the defendant states that his survey and certificate were made out by a deputy of *Calder*, who usually made the surveys in the reserves of *Baltimore*. That his object in the purchase and survey was to join his two tracts; and a survey he admits was made called *Singery's Trouting Streams*, and returned to the office, on which patent afterwards issued to the defendant. That he does not know, nor was he ever privy, to any fraud or deception in making the survey or certificate of that land; nor does he know, admit or believe, there was any. He admits the call in the certificate greatly increases the quantity of his land, but he states the call was essentially ne-

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cessary to join his two tracts together, which was the object of his purchase, and if the surveyor mistook the length of line, or quantity of acres, it was not with the consent, knowledge or privity, of the defendant. He does not believe the certificate recorded in *Calder's* book to be a true copy of his certificate; and that *Calder* is grossly mistaken in two important facts, and those facts are misconceived and mistaken in the bill of complaint. That *Calder* never did make out or sign a certificate of *Singery's Trouting Streams* for the office, but that the same was made out, signed and returned, by the deputy, and is now in the office, and it was usual and customary for *Calder's* deputy so to do with his assent, as will appear by a great number of original certificates in the land office, made out at the very period when the defendant's was, and some of them on surveys made in the reserves. That the certificate returned to the office is the true and genuine certificate of *Singery's Trouting Streams*, which was made out for, and delivered to him as such, by *Calder* in person, to whom the defendant carried it, and the same has a call to the beginning trees of *Petticoat's Loose*, which was a well known place, and intended to be run to and called for; and the defendant can prove, that on the original survey made, the beginning trees of *Petticoat's Loose* were actually run to, and he offered such evidence on the trial of the ejectment cause referred to by the bill of complaint, which testimony the general court refused to admit. The defendant does not pretend to know what may have been the rules of the land office at that time as to the calls, but *Calder* is mistaken in his deposition filed, because there are many certificates in the office made out and signed by him, of surveys at that time of reserve lands similar to the defendants, in which *Calder* hath inserted calls. The defendant denies all fraud, combination, &c. That the call in his certificate and patent were of such notoriety, and his possession of, and the beginning trees of *Petticoat's Loose* were so well known to the neighbourhood, and to the surveyors in the county, that younger surveys were made, which called for and run with the line and to the call mentioned in the defendant's patent, as is demonstrated by the location of the tract of land called *Horatio's Lot*, on the plat filed. That the defendant, actuated by the most honest principles, made a resurvey on his land in

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1792, and included the whole of his lands, and returned a certificate to the office, and the excess of the number of acres was called surplus; that he was willing to pay for it, and made his resurvey with that intent, but by reason of the act of 1785, *ch.* 81, the treasurer could not receive such payment, and it was not until after this transaction that the relator, combining and leaguing with *Calder*, who to cover his own negligence and malconduct in office, combined with the relator to cheat the defendant out of his land, and recommended the relator to take up the surplus as vacancy, which *Calder* was to support, by throwing all blame on his deputy, although the records of the land office falsify the oath of *Calder* in two essential facts; first, they show that it was customary for his deputies to make out certificates and sign his name; and secondly, that he himself, in certificates made out and signed by him, did give calls. He admits the action of ejectment instituted in the general court by the lessee of the relator, for recovery of part of the defendant's land, included in the relator's tract called *Boreing's Habitation Rock*, but the facts never came to issue; that the case was determined on a point of law, to which a bill of exceptions was taken, and the judgment of the court was appealed from, and the appeal will go up to the court of appeals in June next. He does not believe the relator is entitled in any court of law or equity to a vacation of the defendant's original grant, the same can only originate in a desire to ruin and oppress the defendant; because if the relator ultimately succeeds in the court of appeals, a decree to convey all the defendant's right and title to the relator, in fee, of all the land contained in his patent of *Boreing's Habitation Rock*, will be sufficient. He further states, that he claims the whole of the land included in his patent called *Singery's Trouting Streams*; that the call was an honest one; that the tracts of land called *Merryman's Mountain* and *Petticoat's Loose*, never did lay contiguous or close to each other, but always lay, were located and held, as by the table of courses thereof on the plot filed; that the survey was made by a deputy of *Calder* named *James Hall*, who made out the certificate, as was common with *Calder's* deputies in the reserves, and that *Calder* did not himself make the same out; and the defendant believes the mistake exists on *Calder's* books; that the entry was made therein from the deputy's field notes,

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and the call omitted to be inserted; that the call did exist in the original, and was actually *bona fide* run to at the time of the survey; and the defendant ought not to lose his land from the fraud, negligence or mistake, of *Calder* and his deputies.

The *testimony* of a number of witnesses was taken under commissions and returned. The defendant afterwards by his petition, (referring to the proceedings herein set forth, and to the action of ejectment depending between the parties,) stated that the judgment of the general court in that action had been reversed in the court of appeals, and the record returned to the general court, with a *procedendo* directing a new trial. That since this cause has been set down for hearing in this court, the action of ejectment remanded to the general court for a new trial. has been tried, and a verdict rendered in favour of the defendant. *(ante, 455.)* That on that trial, the general court gave a direction to the jury, that if the certificate of *Singery's Trouting Streams* was forged, that the patent thereon issued was void, or an opinion to that effect. But on a full and fair trial before the jury, a verdict was rendered in favour of the defendant, by which the fairness of the certificate, and validity of the patent was ascertained. That inasmuch as these facts have happened since this cause has been set down for hearing in this court, he is apprehensive that he will not be able to avail himself thereof, without the order of this court. *Prayer* for liberty to exhibit as proof the record of the proceedings in the ejectment, and that the same may be taken as part of the proceedings in this cause.

Hanson, Chancellor, (December 6, 1805.) The chancellor has considered the petition of the defendant. It appears to him convenient to both parties in this cause to grant the prayer of the petition, instead of having proceedings, which would have the same effect as is proposed by the petition, and would be attended with delay and expense. It is therefore ordered, that the prayer be granted; and that the record of the proceedings in the ejectment, stated in the petition, be filed in this cause, and taken as part of the proceedings therein.

The record was accordingly filed; and the case was argued, and submitted to the chancellor for his decision.

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Kelly, Chancellor, (July term, 1806.) The object of the bill is, that the certificate and patent of *Singery's Trouting Streams*, therein mentioned to have been fraudulently obtained, may be vacated and annulled, or corrected in the manner stated.

It was filed on the 19th of November 1799, at which time as the bill states, *Boreing* had obtained a verdict and judgment in his favour in an ejectment for the land, from which *Singery* had appealed.

On the 18th of November 1805, a petition was presented to the late chancellor by *Singery*, stating the verdict and appeal, and also stating that the judgment had been reversed, and that on the suit being again tried, a verdict was rendered in his favour, and praying that the record of the proceedings in the ejectment might be taken as part of the proceedings in this cause; which prayer was granted, as appears by the order of December 6th, 1805.

The proceedings have accordingly been filed, and from their connexion with the other testimony, the chancellor has felt considerable difficulty in forming his opinion.

He was at first persuaded that this verdict was either conclusive as to the question of fraud, or of such weight as to prevent his drawing a different conclusion from the whole of the evidence. The authorities on this subject are not very clear. The case most in favour of this position, is *Underwood vs. Mordaunt*, 2 *Vernon*, 238, in which the court declared, that the question was, whether an assignment was fraudulent or not; and that having been tried at law there was no room for equity to interfere; that if they should relieve the plaintiff, they must declare *that* not to be fraudulent in equity which was found to be so at law.

But on further consideration he has changed his opinion, on the following grounds: That the suit in this case referred to, having been an ejectment, the verdict is not final between the parties, but another ejectment may be brought. On such further suit the verdict may be given in evidence as the opinion of twelve men on the fact, but it cannot be conclusive, as that would be to defeat the object of the suit. And if in a court of law the question of fraud may be again examined, it cannot be closed against a court of equity, in which fraud is the great subject of relief.

It must be admitted also, that the record, which is thus made part of the proceedings, cannot have a greater effect in bar to this suit, than if it had been used as a plea.

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A decree determining the rights of the parties might be pleaded to this bill, and so might a judgment of a court of law, but it must be a judgment which has finally determined the rights of the parties.

The chancellor, considering himself thus empowered to inquire into the fraud alleged in the bill, is satisfied from the evidence, (notwithstanding the verdict showing the opinion of the jury to the contrary,) that the charge is established, and that the complainant is entitled to relief.

In addition to the particular object of the bill, as herein before stated, there is a prayer for general relief, and *Boreing*, at whose relation the bill is filed, is satisfied that *Singery*'s patent should remain valid for such part of the land as is not included in the patent for *Boreing*'s *Habitation Rock*; and it appears that for so much the public has been paid by *Singery*. It is therefore considered proper in this case, and conformable to the practice in similar cases, to decree a conveyance from *Singery* of the part claimed by *Boreing*, instead of vacating the patent to *Singery*, as prayed. *Decreed*, that *Singery* do, by a good and sufficient deed, &c. give, grant, &c. to *Boreing*, and his heirs, all that part of the land in *Baltimore* county, now held by him under his patent for a tract of land called *Singery's Trouting Streams*, which is comprehended in the lines of a tract of land called *Boreing's Habitation Rock*, which was granted by this state to *Ezekiel Boreing* on the 24th of April 1795, beginning, &c. with all and singular the appurtenances, &c. and all the right, title and interest, of *Singery*, therein and thereto. And upon the due execution and acknowledgment and recording of the deed, *Boreing* shall be entitled to hold the same free, clear and discharged, from all claim of the defendant. And that the defendant pay to the complainant the costs of this suit, &c. From this decree the defendant appealed to this court.

The cause was argued before Chase, Ch. J. Gantt, and Earle, J.

Shaaff, and *Johnson*, *(Attorney-General,)* for the Appellant, cited *Underwood vs. Morduani*, 2 *Vern.* 238. *Bright vs. Eynon*, 1 *Burr.* 376. *Fermor's* case, 3 *Coke*, 78. 1 *Fonbl.* 13, *(notes.)* *Moses vs. Macferlan*, 2 *Burr.* 1009; and *Negro James vs. Gaither*, *(ante* 176.*)*

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Martin and *T. Buchanan*, for the Appellee, cited *Gainsborough vs. Gifford*, 2 *P. Wms.* 425. *Kent vs. Bridgman*, *Pre. in Chan.* 233. *Faulconberg vs. Pierce*, *Ambl.* 210. *Stace vs. Mabbott*, 2 *Ves.* 552. *Matthews vs. Warner*, 4 *Ves.* 206. *The Proprietary vs. Jennings*, 1 *Harr. & M'Hen.* 92. *Russell & Lux vs. Falls*, 3 *Harr. & M'Hen.* 457. *The State vs. Reed*, 4 *Harr. & M'Hen.* 65 and *Garretson vs. Cole*, 1 *Harr. & Johns.* 370.

Chase, Ch. J. delivered the opinion of the court. In the ejectment brought by the lessee of *Boreing*, for *Boreing's Habitation Rock*, against *Singery*, the question in issue between the parties, on the different locations on the plots, was, who was entitled to that part of *Boreing's Habitation Rock* which was covered by or included within *Singery's Trouting Streams?* This question might have been decided on the different certificates and grants of the parties, and such evidence as might have ascertained what was the true location of the respective tracts claimed by the litigating parties. It appears by the record and testimony in this case, that the certificate and grant of *Singery's Trouting Streams* are older than the certificate and grant of *Boreing's Habitation Rock*, and would have a preference, so far as the conflicting grants interfered.

To repel the defendant's defence, and to impeach his title, the plaintiff offered to prove, that the certificate of *Singery's Trouting Streams* was forged, and the evidence for that purpose was admitted by the court; and such evidence could not have been deemed admissible by the court, only on the ground that if it was proved to be forged, the grant obtained on it was fraudulent, and could not have any operation in law to pass the land to the defendant. That decision must rest on the principle, that what commences in iniquity must transmit its impure or deleterious quality to the grant which was intended to perfect or complete the title of the party, and will invalidate it, unless the Proprietary was apprised of the mal-practice before the issuing the grant. The evidence in a court of law, and in a court of equity, to impeach them, is the same, parol evidence being admissible in both—the effect and final result is the same. In chancery the patent is vacated, and the judgment and decree are declared to be nullities, and the party is enjoined from proceeding further on

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them. In a court of law, the judgment is that they cannot and do not transfer or pass any right or interest. In a court of law, the mode of examination is preferable, because the evidence is better sifted, and more critically inquired into, and the credit of the witnesses is better tested. Where frauds are clearly established, the courts of law and a court of chancery have concurrent jurisdiction. In some cases it may be necessary to resort to a court of chancery to compel a discovery of facts and circumstances, which are confined to the knowledge of the parties, in order to prove a fraud; which, it is believed, is the only reason why the applications are more frequent, in cases of fraud, to the court of chancery, than to a court of law. If the evidence was improperly admitted because the operation of a grant cannot be questioned in a court of law for fraud in obtaining it, then the verdict of the jury, finding for the defendant, cannot conclude the plaintiff as to the fact whether the certificate was forged or not. But what principle is it which allows a court of law to be competent to inquire into fraud and collusion in obtaining a judgment or decree, and to declare such judgment or decree inoperative to pass any right or interest, which does not extend to a patent? A judgment or decree must stand on as high authority as a patent. In this case the fact of forgery came before the court and jury collaterally, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy? and therefore the verdict cannot be received as evidence to prove that the certificate was not forged. It may very well be questioned, as the court were not called on, and did not direct the jury if they found the certificate forged, that nothing passed by the patent; and as the jury might suppose, notwithstanding the certificate was forged, that the prior grant ought to prevail, and could not be affected by it, whether the verdict could conclude the plaintiff if the fact of forgery had been directly in issue.

Although on a bill in chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet the court of chancery has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant or deed from whence the injury has arisen, or

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will make such decree as the circumstances of the case render necessary.

The court are of opinion, that the forgery of the certificate of *Singery's Trouting Streams*, and the fraud consequent thereon, have been fully established, and affirm the decree of the court of chancery, with costs to the appellee.

GANTT, J. dissented.

DECREE AFFIRMED.

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W P, being seized of a tract of land called *P D*, containing 275 acres, executed a bond of conveyance to J C, conditioned that he would convey to him all his right, &c "of, in and to, 120 acres of land called *P D*, situate, in the county of *B*, with the appertenances thereunto belonging, or appertaining, now in the possession or occupation of the said W P." On a bill in chancery for a specific performance, &c. *Held*, that there being no designation of the 120 acres of land, nor any description whereby it could be identified and located, parol evidence is not admissible to show that it was intended by the parties that they were to be laid off at the southernmost part of the tract. That the bond is void for uncertainty, except on the principle of election, and that there was no evidence to prove that there was any election made by either of the parties anterior to the time of the execution of the deed from W P, for part of the tract described by metes and bounds, to one of the defendants who was a fair and *bona fide* purchaser of the land conveyed to him, without notice that there was any designation of the 120 acres.

APPEAL from a decree of the Court of Chancery. The bill filed by the appellees against the appellants, on the 16th of January 1795, stated that *William Parks*, deceased, was seized and possessed of a tract of land in *Baltimore* county called *Turkey Cock Alley*, containing 50 acres, which by virtue of a special warrant, was on the 10th of July 1754 resurveyed for him, and a certificate thereof returned into the land office, by which he caused to be added 102 acres of land supposed to be vacant, and consolidated the whole into one survey by the same name of *Turkey Cock Alley*. That *Parks*, neglecting to compound for the added vacancy within the time required, a proclamation warrant was thereupon granted to *Edward Stevenson*, and he, on the 22d of February 1764, assigned the same to *Parks*, who by virtue of the warrant of proclamation and assignment, on the 28th of the same month, had resurveyed for him the added vacancy before mentioned, excluding seven acres thereof as being within the lines of elder surveys, and upon the resurvey caused to be added the quantity of 127 acres of vacant land, giving to the whole the name of *Parks's Death Knot;* and on the 5th of March 1764, he obtained a patent on the certificate. That on the 14th of April 1764, *Parks* executed and delivered to *Joshua Cockey*, deceased, a bond of conveyance for 120 acres of the land called *Parks's Death Knot*, by which bond it was, as the complainants believe, intended to secure to *Cockey* 120 acres of the vacancy added on the proclamation warrant, forming the southernmost parts of *Parks's*

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Death Knot. That before *Parks* obtained the assignment from *Stevenson*, (which was procured by *Cockey*,) or at the time of such assignment, it was agreed between *Parks* and *Cockey*, that as *Parks* was unable to pay the caution money on the certificate to be returned in virtue of the assignment, *Cockey* should pay the same, and should have, for such payment, 120 acres of the land, to be secured by the certificate; in consequence whereof *Cockey* did pay the caution money, and thereupon patent issued, as before stated, to *Parks*, and the bond of conveyance was given in pursuance of the agreement. That *Parks*, in his life-time, although he never made any conveyance in pursuance of the bond, always acknowledged the right of *Cockey*, and always was ready and disposed to make the conveyance. That *Parks* died about 10 years ago intestate, leaving a son named *William Parks*, (one of the defendants,) of full age, his heir at law, who hath also at different times acknowledged the bond of conveyance, and the equitable right thereby created. That *Cockey* died some time in 1765, having first duly made his will, dated the 3d of December 1764, whereby, among other things, he devised as follows: "Item. I give and bequeath to my eldest daughter *Penelope Deye Cockey*, 100 acres of land, being part of a tract of land known by the name of *Parks's Death Knot*, lying in the county aforesaid, which said parcel of land I give and devise unto her and her heirs for ever;" and of the said will constituted and appointed *Thomas Cockey Deye* sole executor. That *Joshua Cockey* left the complainant, *Thomas Deye Cockey*, his eldest son and heir at law, then an infant under the age of 21 years, and also the other children mentioned in the will. And that after the death of *Joshua Cockey*, his executor proved his will, and took out letters thereon, and, among other papers of *Joshua Cockey*, came to the possession of the bond of conveyance, and kept the same in his possession until the 4th of February 1793, when he delivered it to the complainant, *T. D. Cockey*, as heir at law of *J. Cockey*. That *Penelope Deye Cockey*, afterwards intermarried with *Thomas Gist*, and she and her husband are two of the complainants in this cause. That *Thomas Deye Cockey*, one of the complainants, believing that the whole of the land intended to be secured by the bond of conveyance was meant to be devised to *Penelope Deye Cockey*, now *Gist*, by the will of *Joshua Cockey*, al-

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though only 100 acres are therein mentioned, did on the 17th of January 1794, execute a bond of conveyance, by which he bound himself to convey to her, in fee, all his right, title and interest, in the said land. That on the 19th of December 1789, *Parks*, the younger, sold and conveyed part of *Parks's Death Knot* to *Job Huntt*, (one of the defendants;) and that the land included, within the metes and bounds in that conveyance, is the south east part of the land intended to be secured by the bond of conveyance before mentioned; and that *Huntt* had full knowledge of the bond, and had seen and read it, and well knew the premises at the time of his purchase, and before the making of the conveyance to him. That on the 13th of March 1790, *Parks*, for the purpose of indemnifying and securing *Huntt* from all claims against the land so conveyed to him, did by another deed convey to him in fee all the residue of *Parks's Death Knot*, with proviso that if *Parks* should indemnify him from all claims against the land first conveyed to *Huntt*, the last mentioned conveyance should be void. That on the 10th of April 1790, *Parks*, among the other lands, conveyed to *Huntt* in fee all the tract called *Turkey Cock Alley*, with an exception as to a small part thereof, and also all the tract called *Parks's Death Knot*, excepting 81 acres thereof before conveyed to *Huntt* by the deed first herein referred to, and also excepting 120 acres of that tract, for which the bond of conveyance was given. That *Parks*, the elder, at sundry times, and down to the time of his death, applied to *Deye*, as executor of *Cockey*, to pay various assessments and charges on the 120 acres of land in the bond of conveyance mentioned, alleging, that as the land belonged to the estate of *Cockey*, all charges thereon ought to be paid out of his estate; in consequence of which applications *Deye*, as executor of *Cockey*, paid all such assessments and charges as were exhibited to him by *Parks*, who acknowledged the bond of conveyance, and that the consideration of the bond had been duly paid, and frequently offered to *Deye* to make him a conveyance of the land mentioned in the bond, as executor of *Cockey*, &c. That in the deed of conveyance last before referred to, *Parks*, the younger, and *Huntt*, (the defendants,) have both acknowledged the bond of conveyance, and an existing right under and in virtue of the same. That *Huntt*, in consequence of the conveyances to him from *Parks*, hath

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entered into and taken possession of the land therein mentioned. *Prayer*, that the defendants may be compelled to convey to the complainant, *Penelope Deye Gist*, in fee simple, or to such of the complainants as may be thereto entitled, the 120 acres of land by the bond of conveyance meant and intended to be conveyed; and for other and further relief, &c.

Exhibit, (among others.) The bond of conveyance from *Parks* and wife, to *Joshua Cockey*, dated the 14th of April 1764, in the penal sum of £500, and conditioned as follows: "The condition of this obligation is such, that if the above bounden *William Parks*, and *Eleanor* his wife, and each and every of them, and each and every of their heirs, executors, administrators and assigns, do and shall, upon demand and at the request, cost and charges, of the above named *Joshua Cockey*, his heirs or assigns, well and truly convey and assure, or cause to be conveyed and assured unto him, the said *Joshua Cockey*, his heirs and assigns, for ever, all the estate, right, title and interest, of them the said *William Parks*, and *Eleanor* his wife, and their heirs, and each and every of them, of, in and to, one hundred and twenty acres of land called *Parks's Death Knot*, situate, lying and being, in the county of *Baltimore* aforesaid, with the appertenances thereunto belonging or appertaining, now in the possession or occupation of them the said *William Parks*, and *Eleanor* his wife, by such sufficient conveyances and assurances in the law, as by the said *Joshua Cockey*, his heirs or assigns, or his or their counsel learned in the law, shall advise and require; then the said obligation to be void and of none effect, or else to be and remain in full force and virtue in law."

The *answers* of the defendants stated, among other things which it is not material to notice, that they were totally ignorant for what consideration the land was to be conveyed, or what part of the land was intended to be conveyed; and they did not know or admit that the southernmost or south easternmost parts was intended to be conveyed under the bond of conveyance. That *Cockey*, or any person claiming under him, never was in possession of any part of the land—nor did they ever hear at any time that *Cockey* was, by virtue of the contract, entitled to the southernmost or south easternmost part. That *Penelope*, one of

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the complainants, came of full age 15 years past or more, and *T. D. Cockey*, (one other of the complainants,) not less than 11 or 12 years past. That *Parks*, the grantor, and after his death, *Parks*, the son, were willing to comply with the bond of conveyance, and convey to *Cockey*, or to whomsoever was entitled under the bond, whatever land they were thereby entitled to have conveyed to them; but no person chose to come forward and receive a conveyance, or ascertain what part of the land he, she or they, were entitled to under the said contract. That on the 23d of October 1789, *Parks*, being desirous of selling the residue of the land to extricate himself from difficulties under which he then suffered, did advertise publickly in the *Maryland Journal and Baltimore Advertiser*, requesting any person who was entitled to the benefit of the bond of conveyance to appear, prefer their claim, and receive a conveyance for the land they might be entitled to thereby. That *T. D. Cockey* and *Penelope Deye Gist*, were then both of full age, and that neither of them did apply to receive the conveyance, although thus called upon. That *Parks* was at that time under execution, and had no method of freeing himself therefrom but by a sale of some part of his lands. That he applied to *Huntt*, and proposed to sell him a part of his lands in order to raise money to free himself from the execution; and in consequence *Huntt* purchased from *Parks* the lands mentioned in the deed of the 19th of December 1789, which was then supposed to contain 31 acres, for which *Huntt* paid six dollars per acre. That the land being found to contain eight and a quarter acres more, he paid for the surplus on the 15th of March 1791. That *Huntt* was induced to purchase the particular part of the land described in that deed, because it lay adjoining to lands which he then owned; and the greatest part thereof actually ran in, and lay between, two tracts of land owned by him. That *Huntt* had seen and knew of the bond of conveyance which had been so executed by *Parks*, the elder, to *J. Cockey*, and had advised with counsel as to the effect thereof, and it was by the advice of counsel that he made his purchase. That on the 10th of April 1790, *Parks* executed a deed to *Huntt* for the lands therein mentioned, which was intended to secure to *Huntt* the payment of £88 3 6, then due to him, with interest. *Huntt* admitted, that on the 13th of March 1790, *Parks*

executed in due form of law another conveyance to him, the object and intention of which was to secure and guarantee to him the lands first sold to him; that after deducting the lands so conveyed by *Parks* to *Huntt* by the first conveyance, there remained a greater quantity of *Parks's Death Knot*, than was contracted by the bond of conveyance to be conveyed to *Cockey*. That they were instructed, that after the length of time which had elapsed since the execution of the bond of conveyance, without the complainants either possessing the land so alleged to have been contracted to be sold to their father, or claiming an execution of the contract, the complainants were not, nor was either of them, entitled to the aid of this court specifically to execute the contract to the prejudice of *Huntt*, who is a purchaser for a valuable and *bona fide* consideration; and they claimed the benefit of the laches of the complainants, and of those under whom they claimed, and of the length of time, as fully and to all intents and purposes as if they had pleaded the same, and relied thereon for their plea.

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Testimony was taken and returned under a commission; and the lands were directed to be surveyed, and a plot thereof was returned.

Kilty, Chancellor, (July term 1806.) The chancellor is of opinion from the evidence, that the bond of conveyance was intended to secure 120 acres of the vacancy added on the proclamation warrant taken out by *Edward Stevenson*, and assigned to *William Parks*, on which a survey was made the 28th of February 1764, as appears by the certificate returned to the land office, being in the whole 127 acres. And also that it was intended to exclude the part added as the third vacancy, although the third vacancy is returned as containing only six acres. The first and second vacancy added are returned as containing, the one six, and the other 115 acres, making together 121 acres instead of 120, which it may be inferred from the evidence they were supposed to contain by the parties to the bond. The complainant, *Penelope Deye Gist*, is therefore entitled under the will, and bond of conveyance from *Thomas Deye Cockey*, which are not contested, to a conveyance for that part of *Parks's Death Knot*, which is claimed by the bill. The part of *Parks's Death Knot* which was conveyed by the defendant *William Parks*, to the other defendant,

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Job Huntt, by the deed of the 19th of December 1789, was stated therein to contain 31 acres, and by the mortgage of the 13th of March 1790, the residue is also conveyed to him, thereby vesting in him the legal title in the whole. And inasmuch as *Parks* has an equitable title to the residue, and by joining in the conveyance for the part conveyed by him to *Huntt* will not be bound to make a general warranty, or be liable to any risk or loss thereby, it is considered that a joint deed will be the most proper to vest the legal title in the complainant, *Penelope Deye Gist*, according to the bonds—*Decreed*, that the defendants shall, by a good deed to be executed by them, and acknowledged and recorded according to law, give, grant, &c. to the complainant, *Penelope Deye Gist*, and her heirs, 120 acres of land called *Parks's Death Knot*, situate, &c. the said 120 acres being part of a tract of land resurveyed for *William Parks*, deceased, father of *William Parks*, one of the defendants, on the assignment of *Edward Stevenson*, on or about the 28th of February 1764, and patented to *William Parks*, deceased, on or about the 15th of March 1764: to be laid off as follows, to wit: To include the whole of the first vacancy described in the certificate of the resurvey, to begin at, &c. containing six acres: to include also the second vacancy described in the certificate of the resurvey, to begin, &c. containing 115 acres, except one acre thereof, which one acre is to be taken off by extending reversely the 16th line of the resurvey on *Turkey Cock Alley*, on which the proclamation warrant was taken out, &c. And all the estate, &c. of the defendants therein, and which was in *William Parks*, deceased, and all and singular the hereditaments and appurtenances to the same belonging, or in any manner appertaining. And upon the due execution, acknowledgment, and recording of the deed, the complainant, *Penelope Deye Gist*, her heirs and assigns, shall be entitled to hold the said land free, clear and discharged, from all claim of the defendants, or either of them; the said conveyance being in satisfaction of the bonds in the proceedings mentioned. *Decreed* also, that the defendants, and each of them, deliver up to the complainants, *Thomas Gist*, and *Penelope Deye Gist his wife*, the quiet and peaceable possession of the land hereby decreed to be conveyed; and that they pay to the complainants the costs

of this suit, &c. From this decree the defendants appealed to this court.

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The cause was argued before CHASE, Ch. J. GANTT, and EARLE, J.

Martin and *Brice*, for the Appellants, referred to *Co. Litt.* 145. 2 *Bac. Ab.* tit. *Election*, (B) 443. *Taylor vs. Stebbert*, 2 *Ves. jr.* 437. *Moor*, 72, case 197. *Hayward's* case, 2 *Coke*, 36.

Johnson, (Attorney General,) and *Winder*, argued for the Appellees.

CHASE, Ch. J. delivered the opinion of the court. The court are of opinion, that in the bond of conveyance from *William Parks*, senior, to *Joshua Cockey*, there being no designation of the 120 acres of land to be conveyed to *Cockey*, nor any description whereby the same could be identified and located, parol evidence is not admissible to show that it was intended by the parties that the 120 acres were to be laid off at the southernmost part of the tract of land called *Parks's Death Knot*. That the bond is void for uncertainty, except on the principle of election; and there is no evidence to prove that there was any election made by either of the parties, or their representatives, anterior to the time of the execution of the deed from *William Parks*, junior, to *Job Huntt*, on the 19th of December 1789. That *Huntt* was a fair and *bona fide* purchaser of the land conveyed to him by that deed, without notice that there was any designation of the 120 acres to be conveyed in virtue of the bond of conveyance to *Cockey*, or his heirs. That *Penelope Deye Gist* is entitled to a conveyance of 120 acres of land, part of the 222 acres of vacancy secured by the proclamation warrant taken out by *Edward Stevenson*, and assigned to *Parks*, the elder. *Decreed*, that the decree of the court of chancery be reversed, with costs to the appellants, and that the appellants, by a sufficient deed or deeds, convey to *Penelope Deye Gist*, one of the appellees, and her heirs, 120 acres of the vacancy of 222 acres, to be laid off together in one body, if practicable, if not, so as to be most convenient, exclusive of the land conveyed to *Huntt* by *Parks*, the younger, by the deed of the 19th of December 1789,

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and exclusive of the land conveyed by *Parks* to *Arabella Worrell*. That the court of chancery make all necessary orders, and take measures for having this decree carried into full and complete effect.

DECREE REVERSED, &c.

DECEMBER.

In an action of trespass *q. c. f.* the court refused to direct the jury, that if the plaintiff, 20 years before bringing the action, run his land in the presence of the defendant to a point, marked on the plots in the cause, as a boundary between his land and the land of the defendant, and the several lines from that point to certain other points, also marked on the plots, as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, in such case he is not a trespasser, and not liable to the action, unless he was previously warned or forbid to come to said lines.

THOMAS vs. THOMAS.

APPEAL from *Frederick* County Court. Trespass for breaking and entering the close of the plaintiff, (now appellee,) called *The Resurvey on Hazzard*. The defendant, (the appellant,) pleaded the general issue. A warrant of resurvey was ordered and issued, and the lands in dispute were located and plots returned. The plaintiff at the trial in August 1806, offered in evidence the patent of *The Resurvey on Hazzard*, granted to *Notley Thomas*, on the 14th of February 1734; that the patentee entered and died seized, and that the plaintiff is his heir at law, and entered, &c. He further offered in evidence the plots and explanations, and the patents for the several tracts of land located thereon by him, and that the same are truly located by him on the plots. He also offered evidence, that the defendant had cut down, cleared and cultivated, part of the land within said locations; that the plaintiff in 1800, before this suit was brought, forewarned a person who was working under the direction of the defendant within said locations, not to cut on his land, and which person, having given the information to the defendant, was directed by him to cease cutting there. He also offered evidence, that he had at two different times told different persons that he expected one day to get the land now in controversy, but the defendant was not present at either of those conversations, and did not appear ever to have heard of this claim. The defendant then read in evidence the patent of a tract of land called *Moreland*, granted to him on the 28th of June 1784. He also gave in evidence the plots and explanations, with the several locations by him made thereon, and offered to prove that such locations were truly made. He also read in evidence a record, with the plots and explanations belonging thereto, of an action of *trespass* instituted in *Frederick* county court by the plaintiff, against him the defendant, for breaking and entering the close of

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the plaintiff called *The Resurvey on Hazzard*, to which the defendant appeared and pleaded the general issue, and a warrant of resurvey issued, and the lands in dispute were located on plots made and returned in that action. At the trial in that suit, the jury gave their verdict that the defendant was not guilty of the trespass complained of, and the plaintiff was nonsuited. He also offered evidence, that the plaintiff and defendant in that action, and in the present action, are the same persons, and that the tracts of land, so far as in that record located, are the same as located in the present suit. That the pretensions and locations of the plaintiff on the plots in that record, of the land called *The Resurvey on Hobson's Choice*, from the end of the 41st line thereof to the end of the 44th line, correspond with the location as made by the defendant on the plots in this cause. He also offered evidence, that the plaintiff in 1782 acted as surveyor to run the division lines between the plaintiff and defendant, and that the lines were run, and an apple tree was marked at the end of the 41st line of *The Resurvey on Hobson's Choice*, in the presence of the plaintiff and defendant, as a corner between them. That from the apple tree so marked, the plaintiff run, as divisional lines between himself and the plaintiff, the lines located by him on the plots; and that the defendant has ever since that running been cutting and clearing the land on the west side of the said divisional lines. Other evidence was given by the defendant, which it is unnecessary to notice, it having no relation to the point decided by the court. The defendant then prayed the opinion of the court, and their direction to the jury, that if from the evidence they find that the plaintiff, twenty years before the institution of this suit, run his land in presence of the defendant to the aforesaid apple tree, as a boundary between his lands and the lands of the defendant, and the several lines located by him as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, that in such case the defendant is not a trespasser, and not liable to this suit, unless he was previously warned or forbid to come to said lines. But the county court, [*Buchanan*, Ch. J. *Clagett* and *Shriver*, A. J.] refused to give the direction as prayed. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

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Berry vs Nicholls

The cause was argued before Chase, Ch. J. Nicholson, Gantt, and Earle, J. by

Harper, for the Appellant; and by
Shaaff, for the Appellee.

JUDGMENT AFFIRMED.

DECEMBER.

A judgment having been obtained by B against E, and C his surety, a *fi. fa.* issued thereon against E, who survived C, and was laid on E's lands. The administrator of C paid the amount of the judgment to B, who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C, for a sale of the lands, was returned unsold, and was, on motion of the defendant, *quashed*.

BERRY, use BURGESS's Adm'r. vs. NICHOLLS.

VENDITIONI EXPONAS. A judgment was rendered in the late general court at May term 1791, in favour of *Z. Berry* against *E. Nicholls* and *C. Burgess*, on which writs of execution regularly issued, but were not executed, until the 14th of July 1806, when a writ of *fieri facias* was issued, returnable to this court, against *Nicholls* as survivor of *Burgess*, whose death was suggested, and was returned by the sheriff, "laid as pr. schedule, not sold, &c." The schedule described the property as follow: viz. "one house and lot in the town of *Upper Marlborough*, in the possession of *John Hodges* of *Thomas*; and one house and lot in the town of *Upper Marlborough*, occupied by *Philip T. Baker*, Esquire." The plaintiff gave directions in writing to the clerk of this court, dated the 19th of August 1809, to have the judgment he had obtained against *E. Nicholls*, and *C. Burgess* as security, entered for the use of *Dennis M. Burgess*, adm'r. of *C. Burgess*, the money having been paid to him by said *Burgess*. On the 10th of November 1809, the present writ of *venditioni exponas* issued for a sale of the above property, and was *endorsed* for the use of *Dennis M. Burgess* administrator of *Charles Burgess*, and was returned by the sheriff, that the property remained unsold, &c.

Motion on the part of the defendant to quash the writ of *venditioni exponas*, for the following reasons: 1. Because, in the description of the property taken under the *fieri facias*, there was not such certainty as the law requires. 2. Because the judgment, whereon the execution issued, was obtained against the defendant and *C. Burgess*, and by the endorsement on the execution, and the note of the plaintiff to the clerk, filed in court, it appeared, that before issuing the *fieri facias* the judgment was *satisfied*, and the execution was issued *for the use* of

the administrator of one of the original defendants against the other. 1809 Berry vs Nicholls

The motion was argued before CHASE, Ch. J. NICHOLSON, GANTT, and EARLE, J. by

Magruder, for the motion; and by
Clagett, contra.

THE COURT sustained the motion, and

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AN

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OF THE

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A.

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1. An appeal or writ of error, *standing under rule argument*, does not abate by the death of either party. *Lynch v Colegate*, 37 *(note.)*
2. The act of 1797, *ch.* 114, *s.* 4, directing, "that if a cause in the court of chancery is set down regularly for hearing, or submitted to the chancellor, and one of the parties dies thereafter, and before a decree is passed, the cause shall not abate, and the chancellor may decree as if such party were alive," cannot take effect in a cause where there might be a decree for a reconveyance of land to the party dead, on paying or bringing money into court. *Brogden v Walker's Ex'r.* 285
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3. If a grantor of land, residing in a particular county, and having a temporary residence in another county, in neither of which counties does the land lie, acknowledges the deed in the county in which his temporary residence is, such deed is not good and valid in law to pass and transfer the grantor's interest in the land. *Hall v Gittings's Lessee*, 383
4. A temporary residence in any county of the state, is not sufficient to enable a grantor, being a citizen of the state, to acknowledge a deed, during such temporary residence, for land lying in any other county of the state. *Ib.* 390
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6. Where land had been devised by A to his son B, intail male, remainder intail male to his eldest son C, remainder intail male to his third son D, remainder in fee to his two daughters E and F, as tenants in common, was, on the petition of B to the legislature, stating that he had only *female heirs*, (viz. two daughters L and M) who could not inherit the land, whereby it would descend to C, (who united in the petition,) by an act of the legislature vested in the *said female heirs, their heirs and assigns*, with a proviso that if B should have any male heirs at the time of his death, or that the said female heirs should not have issue, then the land should descend and stand limited as by the will of A is devised. Afterwards B had a son born named G, who died in the life-time of B, leaving three daughters, H, J and K. During the life of G, the land was conveyed to him in fee by B, of which he died seized, leaving the said three daughters. B afterwards died, leaving issue his said two daughters L and M, who entered, &c. They are both since dead, M having survived L, leaving a daughter N, married to the defendant. On ejectment brought in the name of the lessee of H, J and K, the three daughters of G—*Held*, that *female heirs* meant the two daughters of B, and that an estate in fee simple vested in them to be defeated on the happening of two contingencies, 1st. If B left issue male at the time of his death, and 2d. If B should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue; and that the plaintiff was not entitled to recover. *Ib.*
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BILL OF EXCHANGE.
1. In *assumpsit* on a foreign bill of exchange, the plaintiff is to recover as much money as will, at the time of the verdict, purchase a similar bill. *Bryden v Taylor*. 400
See Notary Public 1.
—— Promissory Note.

BILL OF REVIEW.
See Court of Chancery 8, 9, 10, 11, 12, 13, 14, 40.

BILL OF REVIVOR.
See Abatement 2.
—— Court of Chancery 20, 22.

BILL OF SALE.
1. If slaves remain in the possession of the vendor, the bill of sale must be acknowledged and recorded; and whe-

ther or not they remained in his possession, is a matter of fact for the jury; and if they were not in his possession, then the bill of sale is not required to be recorded, and it is not evidence, although it has been recorded, unless the execution of it is proved. *Dorsey v Gassaway.* 403
See Mortgage 6.

BINDING EXPRESSIONS.
See Grant 30, 36, 39.

BLANK INDORSEMENT.
See Promissory Note 1.

BOND.
1. The court will not so construe the recital in a bond as to defeat its operation and render it a nullity. *M'Mechen v The Mayor, &c.* 41
A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Williams v Hodgson.* 474
3. —— Such bond, although not binding on the partner who did not execute it, is obligatory on the partner who did execute it. *Ib.*
See Auctioneer 1.
—— Judgment 2, 3.
—— Non Est Factum 1.
—— Surety 1.
—— Uncertainty 1.

BOUNDARIES OF LAND.
See Hearsay Evidence 1, 4,

BREACH.
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BRITISH SUBJECTS.
1. No *British* subject could hold lands in this state on the 19th of November 1794. *Owings v Norwood's Lessee,* 104
See Confiscation.
—— Equitable Estate 4.
—— Mortgage 4, 5, 7.

BRITISH TREATY.
See Confiscation 3, 4, 6.
—— Mortgage 5, 7.

C.

CALLS IN SURVEYS AND GRANTS.
See Grant 30, 33, 34, 35, 39.
—— Location of Lands 8.

CAUSE OF ACTION.
1. If the plaintiff in an action of *assumpsit* files an account in court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that in which he has elected by his account to consider the defendant his debtor. *De Sobry v Terrier.* 222
See Contract.
—— Foreign Laws.
—— Joinder of Actions 1.

CAUTION MONEY.
See Composition Money.

CAVEAT.
See Grant 17.
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See Warranty.

CERTAINTY.
See Ejectment 29.
—— Verdict 4.

CERTIFICATE.
See Acknowledgment of Deeds 5.
—— Clerk 1.

CERTIFICATE OF SURVEY.
1. Where a certificate of resurvey was liable to be vacated upon a caveat, and the vacant land included therein might be and was legally granted to another person—Whether or not a grant for the land in the first mentioned certificate will pass the land? *Quere. Hammond et al Lessee v Norris,* 141
Hammond et al. Lessee v Warfield, 151
See Evidence 26, 27.
—— Forgery 1.
—— Fraud 4, 6, 7.
—— Grant 15, 16, 19, 20, 21, 22, 24, 41.
—— Land Office 10, 11.
—— Notice 2, 3.
—— Parol Evidence 3.
—— Relation.
—— Warrant of Resurvey 3.

CESTUI QUE USE.
1. A judgment by confession is an admission of the right of the nominal plaintiff to recover the penalty of the bond; and whether the judgment is in the right of the plaintiff, or for the use of another, is not material, and cannot be a cause of reversing the judgment. *M'Mechen v The Mayor, &c.* 41

2. Whether or not a trust estate is answerable to the creditors of *cestui que trust? Hollingsworth, et ux. v M'Donald, et al.* 230
See Assumpsit 4.

CHALLENGE.
See Criminal Prosecution 6.

CHANCERY.
See Court of Chancery.

CLERK.
See Evidence 8, 17, 31, 45.
—— Commission and Commissioners 3.

COLLATERAL CONDITION.
See Judgment 2, 3.

COLLATERAL QUESTIONS.
See Evidence 38, 87.
—— Fraud 6.
—— Verdict 6.

COLLOQUIUM.
See Slander 7, 8.

COMMISSION AND COMMISSIONERS.
1. In executing a commission issued to a foreign country for the purpose of taking testimony, notice is not necessary; but time should be given, that the opposite party might exhibit cross interrogatories. *Owings v Norwood's Lessee,* 96
2. As to the manner of striking commissioners and issuing commissions to a foreign country to take testimony. *De Sobry v Terrier,* 196
3. In executing a commission to take testimony, it is not necessary that the commissioners should appoint a clerk. *Beard v Heide,* 442
4. Depositions returned under a commission issued to *Pennsylvania* to take testimony in the cause, were not permitted by the general court to be read in evidence, it not appearing by the return of the commissioners that they had given any notice, or that proper notice had been given. *Boreing's Lessee v Singery,* 459
5. Depositions similarly taken were not permitted to be read in evidence, although offered in evidence by the opposite party; concurred in by the court of appeals. *Ib.* 460
See Foreign Laws 2.

COMMON LAW.
See Conveyance 3.
—— Trust and Trustee 1.

COMMON RECOVERY.
See Feme Covert 2.

COMMON WARRANT.
1. A common warrant may be located on any uncultivated land in the county, to the surveyor of which it is directed, if no person has acquired a right of pre-emption to such vacant land. *Hammond et al. Lessee v Norris,* 132
See Grant 40.

COMPETENT WITNESS.
1. Where there is a mortgage, with covenant by the mortgagor that he will pay the money, and he assigns his equity of redemption, is he a competent witness for the assignee to prove that the money loaned was continental money? *Worthington v Bicknell,* 58
See Hearsay Evidence 1.
—— Witness 2.

COMPOSITION MONEY.
1. As to the manner of applying land warrants to the payment of composition money. *Hammond et al. Lessee v Warfield,* 152
2. The jury are to find when the composition money was paid on surveys of land. *Ib.*
3. Where the relation of a grant to the certificate of survey depends upon the time when the composition money was paid. *Hammond et al. Lessee v Norris,* 132
Hammond et al. Lessee v Warfield, 152
See Grant 41.

CONDEMNATION.
See Attachment 1.

CONDITIONAL SALE.
See Freedom 1.
—— Manumission 3.

CONFESSION.
See Executors and Administrators 8.
—— Judgment 2, 3.

CONFIRMATION.
See Acts 2.
—— Contract 11.

CONFISCATION.
1. Lands liable to confiscation may be granted by the state under an escheat warrant. *Owings v Norwood's Lessee,* 99
2. The state by its commissioners was in possession of all *British* property

within the limits of the state, under and by virtue of the act of confiscation, and the act to appoint commissioners. *Ib.* 101

3. No *British* subject could hold land in this state on the 19th of November, 1794, the time when the treaty with *Great Britain* was made. *Ib.*

4. Where lands were mortgaged to a *British* subject, on failure of payment of the mortgage money, a complete legal estate vested in the mortgagee liable to confiscation, and was vested in the state under the acts of confiscation, subject to the right of redemption; and the *British* treaty cannot operate on such a case. *Owings v Norwood's Lessee*, 105
Howard v Moale, et al. Lessee, 258, 259, (*notes*)

5. The acts of confiscation vested the seisin and possession of all lands liable to confiscation, in the commissioners on behalf of the state, and divested the possession of all other persons. *Hall v Gittings Jun'rs. Lessee*, 112

6. By the acts of confiscation the equitable interests of *British* subjects in lands, were confiscated without *office found*, or entry, or other act done, and although such equitable interests were not discovered until long after the treaty of peace. *Smith, et al. v The State*, 471

See Escheat 1, 2, 3, 4, 5.
—— Mortgage 1.

CONSENT.

See Evidence 19.

CONSIDERATION.

See Court of Chancery 34.
—— Evidence 74.

CONSTRUCTION.

See Acknowledgment of Deeds 1, 2, 3, 4, 5.
—— Acts of Assembly 1, 2, 3, 4, 5, 6.
—— Contract 5.
—— Conveyance 1, 2, 3.
—— Covenant.
—— Criminal Prosecution 1, 2.
—— Devise 4.
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—— Recital 1.
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See Evidence 75.

CONTIGUOUS VACANCY.

See Warrant of Resurvey 4, 5.

CONTINENTAL MONEY.

See Court of Chancery 3, 26.
—— Mortgage 1, 2.

CONTINGENCY.

1. A will to take effect on a contingency, has no effect if the contingency does not happen or take effect. See WILL 3, and
Wagner v M'Donald, 346

CONTRACT.

1. A contract executed in 1764, agreeing to convey a tract of land, enforced by the court of chancery in favour of the heir at law, on bill filed in 1792. *Haffner v Dickson*, 46

2. If a contract is in writing it will itself show where it is to be executed; but if it does not appear by the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. *De Sobry v Perrier*, 220

3. If a contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed. *Ib.*

4. A contract made in a foreign country must be governed by the laws of that country, and no acknowledgment of the debt in another country can change the original nature of the debt. *Ib.* 221

5. It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the *Lex Loci* as to what respects the essence of the contract; that is, the rights acquired, and the obligations created by it; and the remedy or mode of enforcing the contract is to be conformable to the laws of the country where the action is instituted. *Ib.* 228

6. Where by the terms of a contract it is to be executed in another country, there the parties to it, by common consent, adopt the laws of that country as the rule of decision. *Ib.*

7. Where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries, would not be enforced in this state. *Ib.*

8. A contract made in one country with

a view to the execution or performance of it in another country, is governed in all things both as to its essence and the mode of enforcing it, by the laws of the latter country. *Ib.*

9. If a contract is made in this state between foreigners, and the debtor dies in a foreign country, the creditor may recover in this state according to our laws. *Ib.*
10. The court of chancery will not enforce a specific performance of a speculating contract for continental money. *Hopkins v Stump et al.* 301
11. If a mortgagor of slaves sells them for a full consideration, and after his discharge under an insolvent law, purchases them of the mortgagee, his subsequent acts in perfecting his title to the slaves, will enure in law to confirm and not to defeat his contract with the vendee. *Dorsey v Gassaway,* 411
12. As to a variance between a description of land contracted to be sold, and conveyed, and that used in a grant of the land. See COURT OF CHANCERY 33; and *Hammond v Sappington,* 446
13. There being no designation of part of a tract of land, contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner, and the bond is void for uncertainty, except on the principle of election. *Hunt and Parks v Gist et al.* 498

See Covenant.
—— Creditor 1.
—— Equitable Estate 2.
—— French Laws.
—— Parol Agreement.

CONVEYANCE.

1. The same words, which in a devise of land would create an estate tail, will in a conveyance of a freehold estate create a fee tail. *Hollingsworth et ux. v M'Donald et al.* 230
2. In a conveyance of a freehold or legal estate, technical words are appropriated by law to the creation or limitation of particular estates; for instance, to create an estate in fee, the limitation must be to J S, and his heirs, and to create a fee tail, to J S, and the heirs of his body. The words *de corpore suo* are not indispensably necessary, but may be supplied by words equipollent or tantamount, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend. *Ib.*
3. Whether or not the court is at liberty, in expounding a deed of conveyance creating or limiting a use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties as in a will? *Ib.*
4. A deed of conveyance, executed by a tenant in tail, and not enrolled within the time prescribed by law, but enrolled thereafter, and after the death of the tenant in tail, under a decree of the court of chancery for that purpose, cannot operate against the issue in tail. *Jones et al. v Jones,* 281
5. An estate tail is not within the provisions of the act of 1785, *ch.* 72, *s.* 11, authorising the chancellor to decree the recording of certain deeds. *Ib.*
6. If a grantor of land, residing in a particular county, and having a temporary residence in another county, in neither of which counties does the land lie, acknowledges the deed in the county in which his temporary residence is, such deed is not good and valid in law to pass and transfer the grantor's interest in the land. *Hall v Gittings's Lessee,* 383
7. A temporary residence in any county of the state, is not sufficient to enable a grantor, being a citizen of the state, to acknowledge a deed, during such temporary residence, for land lying in any other county of the state. *Ib.* 391
8. The words "*legally authorised and assigned,*" in a certificate of the clerk of a county court to a deed of conveyance acknowledged before two justices of the peace of that county, is a substantial compliance with the directions, and within the meaning of the act of *November* 1766, *ch.* 14, and are words of the same import as "*duly commissioned and sworn.*" *Ib.*
9. As to a variance between a description of land contracted to be sold and conveyed, and that mentioned in a grant of the land, see COURT OF CHANCERY 33, and *Hammond v Sappington,* 446
10. Where the court of chancery, in-

stead of vacating a grant, decreed a conveyance to be executed by the party claiming under the grant. *See* Court of Chancery 4, and *Singery v The Attorney-General*, 487
See Acknowledgment of Deeds 1, 2.
—— Bargain and Sale 1, 2.
—— Court of Chancery 20, 24, 44.
—— Description 2.
—— Estate Tail 2, 3, 7, 8.
—— Evidence 9, 16, 24, 25, 57.
—— Feme Covert 1, 2, 3.
—— Inspeximus 1.
—— Location of Lands 4, 14.
—— Mortgage 6.
—— Parol Agreement 2.
—— Presumption 3.
—— Proprietary 5.
—— State 1.

COPY.

See Authentication 1.
—— Evidence 33, 45, 59, 73.
—— Notary Public 1.
—— Office Copy.

CORPORATION.

1. Whether or not a corporation can appear to and prosecute an action unless by an attorney legally authorised by letter of attorney under their corporate seal? *Quere.* The warrant of attorney need not be spread on the record. *M'Meehen v The Mayor, &c.* 41

COSTS.

See Court of Appeals 2.
—— Dower 3, 4.

COUNTERFEIT BANK NOTE.

See Assumpsit 5.

COUNTERLOCATION.

See Location of Lands 3, 5, 16.

COURSE AND DISTANCE.

See Grant 30, 33, 34, 35, 37.
—— Location of Lands 8.

COURT.

See Foreign Court.
—— French Laws 3.
—— Fraud 2, 4, 5, 6.
—— Seal 1, 2, 3.

COURT OF APPEALS.

1. The appellate court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior court. *M'Meehen v The Mayor, &c.* 41
2. A decree of the court of chancery in favour of the *complainant*, but that each party *bear his own costs*, was on the appeal of the *defendant*, reversed as to costs, and a decree passed directing that the appellee should recover his costs in both courts. *Haffner v Dickson*, 46
Worthington v Bicknell, 58
Hoffman v Baker, 486

See Bill of Exceptions 1, 2.
—— Procedendo 1, 2.

COURT OF CHANCERY.

1. A bond for the conveyance of a tract of land, executed in 1761, enforced by the court of chancery in favour of the heir at law of the obligee, on a bill filed in 1792. *Haffner's Devisees v Dickson's heir*, 46
2. Where a person, having the equitable interest in land, is in possession, yet if his equitable interest is not known, it will not prevail, if established, over the legal estate commencing subsequent to the equitable interest. *Davidson v Robinett, et al.* 55
3. A executed a mortgage to B, of real and personal property, to secure the payment of a sum in the *then* current money, and it was afterwards agreed between them that the personal property should be released, on A's endorsing on the mortgage that it was a *specie* debt. A afterwards conveyed his equity of redemption in the real estate to C, who, on the representations of B, of the sum due on the mortgage, and that it should not be released unless C executed to him his bond for that sum, did accordingly execute such bond: on which a suit at law was brought, and judgment rendered thereon. On a bill filed by C, an injunction was obtained to stay proceedings at law. The auditor was ordered to state the mortgage debt in continental money, reducing it into specie at 5 for 1, with interest, and credit the payments made; and on such statement the debt appeared to be overpaid. *Decreed*, that the injunction be perpetual. *Worthington et al v Bicknell*, 58
4. A contract for the purchase of land, *bona fide* made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance. A judgment obtained by a third person a-

gainst the vendor, *mesne* the making the contract and the payment of the money, cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*. *Hampson v Edelen*, 64

5. Where A, in consideration of a debt due from him to B, assigns to him (not under the act of 1763, *ch*. 25, *s*. 9, 10,) the bond of C, and C is or becomes insolvent—On a bill filed by B against A, to compel payment of the bond so assigned—*Decreed*, that the court of chancery had no jurisdiction; that if the assignment was an extinguishment of the original debt, the complainant was not entitled to relief either at law or in equity; and if the assignment was not an extinguishment of the original debt, the complainant had his remedy at law on the original contract, there being no circumstances disclosed in the bill to make it necessary for him to resort to a court of equity. *Gover v Christie & Jay*, 67

6. A parol contract between a father-in-law and son-in-law, that the father-in-law would give a real estate to his grandson, in consideration of the son-in-law paying one half of the value of the land—Not enforced, though possession was held by the son-in-law, and a part of the purchase money paid. *Wingate v Dail*, 76

7. A specific performance of a bond for the conveying of lands, executed in 1777, decreed, on bill filed in 1797, although strongly contested on the ground that the bond was never executed, or if executed, that it was obtained by fraud. *Saunders et ux. v Simpson et ux.* 81

8. A decree of the chancellor is subject to his control only upon a bill of review, or a bill in the nature of a bill of review. *Hollingsworth et ux. v M'Donald et al.* 230

9. A bill of review lies after the decree is signed and enrolled, *Ib.*

10. A bill in the nature of a bill of review lies after the decree is made, but before enrolment, *Ib.*

11. A decree must be considered as enrolled after it is signed by the chancellor, and filed by the register, *Ib.*

12. A bill of review will only lie for two causes—Error apparent on the decree, or for some matter relevant, existing at the time of the decree, and discovered since, *Ib.*

13. A bill of review cannot be supported for matter existing at the time of the decree, and discovered since, without affidavit of such, and the existence of it at the time of the decree, to lay the foundation for applying to the chancellor for his leave to file a bill of review, and obtaining such leave. *Ib.*

14. On petition suggesting proper matter, supported by affidavit, as the ground for filing a bill of review, the chancellor exercises his judgment on the propriety of interfering or meddling with his decree, for the cause disclosed, and grants or rejects the application accordingly, *Ib.*

15. A and B entered into a bond to C, on which separate suits were brought, and judgments recovered. B pays both judgments, and, as surety therein, obtains an assignment of the judgment against A, from the attorney of C, and issued an execution in his own name, as assignee of C, against A, on the judgment against him, for the whole sum of money recovered. A filed a bill in the court of chancery against B, charging that the bond was for a joint debt due from both of them; that he had paid nearly one half of the debt, and that B was liable for the other half—Also, that B was indebted to him in a sum of money recovered by a decree in chancery, which he refused to discount—prayer for general relief, and for an injunction to stay the execution. Injunction granted. B by his answer denied that the debt was a joint one; that he was the surety of A in the bond. He admitted the decree obtained, but that he had appealed therefrom, which appeal was depending and undetermined. *Decreed*, that B was a co-principal with A in the bond to C, on the ground that he received in specifics, as his share of the personal estate of his father, (for whose debt the bond was given,) as a consideration for his becoming a principal in the bond with A. That A be charged with one half of the amount of the bond, with interest, and credited with the payments by him made, and the amount of the decree since finally made in his favour, and be also charged with B's distributive share of his father's estate, with interest. By which a balance was due from A to B. *Decreed* also, that the injunction be dissolved, and that B be permitted to take out execution at law in the name of C, for the use of B, against A, on the judgment at law, for the said balance, with interest, &c. and costs at law. *Norwood v Norwood*, 238

16. An answer to a bill in chancery is

not to be considered as standing good if it be contrary to the testimony of at least two witnesses, or of one witness and strong equitable circumstances. *Norwood v Norwood*, 258
Hopkins v Stump et al. 3 4
17. On a bill in the court of chancery to be relieved against the verdict of a jury, and judgment thereon rendered at law, it appeared that the application in effect was, that the chancellor act as a tribunal of appeal from the verdict of a jury. There was stated no surprise on the complainant whilst defendant at law; no discovery of testimony since the trial at law, and there was no sufficient proof of fraud. *Decreed*, that the facts set forth by the complainant, in his bill of complaint, were not sufficient to warrant the court of chancery to interpose and grant the relief prayed. *Conlee v Cooke*, 179
18. The court of chancery cannot decree that a deed of conveyance, executed by a tenant in tail, may be recorded after the expiration of the time limited by law for the recording of deeds—an estate tail not being within the provisions of the act of 1785, *ch.* 72, *s.* 11. *Jones et al. v Jones*, 281
19. The act of 1797, *ch.* 114, *s.* 4, directing "that if a cause in the court of chancery is set down regularly for hearing, or submitted to the chancellor, and one of the parties dies thereafter, and before a decree passed, the cause shall not abate, and the chancellor may decree as if such party were alive," cannot take effect in a cause where there might be a decree for a reconveyance of land to the party dead, on paying or bringing money into court. *Brogden v Walker's Ex'r. &c.* 285
20. A bill in the court of chancery, (which was afterwards, on the death of W, the complainant, revived in the name of his executor, legatees and devisees,) charged that B, (the defendant and uncle of W,) committed a fraud in procuring W's execution and acknowledgment of deeds conveying his whole estate, real and personal, variant from those he had agreed to execute; that the deeds were intended only as a security for a debt due from W to B, and not as absolute conveyances in fee simple—Prayer for a discovery, and permission to redeem the property intended to be mortgaged, on paying the debt, and for a reconveyance, and other relief. *Held*, without deciding whether or not there was fraud in obtaining the deeds, that the deeds are to be viewed as executed by a weak young man, conscious of his inability to protect his property, or to manage his own concerns, and therefore resolving to place himself under the guidance and protection of an affectionate relation. That it could not be imagined he meant to convey every part of his ample property for the benefit of his kinsman only, and to be absolutely dependent on him for subsistence. The best and fairest construction is, that the deeds were intended to secure to B a debt, which was trifling in comparison of the value of the property conveyed. Here then was a resulting trust, or here there was an equity of redemption, or here was a silly intemperate young man, who really did not know what he was about, and who therefore ought to have the protection of a tribunal, whose peculiar duty it is to watch over idiots, lunatics, madmen and fools. If W was actually apprised of the purport of the deeds, yet it may be said that it was sufficient for B to have an ample security for his debt, and to screen his nephew from all imposition which might be attempted by others. *Decreed*, that on payment to B, on or before, &c. of the sum of money expressed as the consideration in the bill of sale, with interest, &c. B should convey, &c. to the executor complainant, all the personal property, &c. And on payment to B, on or before, &c. of the sum of money expressed as the consideration of the deed of conveyance, with interest, &c. B should convey, &c. unto the devisees complainants, and their heirs, according to the will of W, the land which was conveyed by W to B, &c. But if the complainants should fail to make payments, &c. there should be sold, for the payment to B of the said two sums of money, with interest, &c. so much of the personal property and land as should be necessary, &c. *Brogden v Walker's Ex'r. &c.* 291
21. Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. *Ib.* 292
22. The relief which may have been obtained by a complainant who has died, may be granted to his representatives reviving the suit. *Ib.*
23. A representative instituting an ori-

ginal suit may have the same relief which would have been granted to his ancestor, devisor, testator, &c. *Ib.*

24. A R being indebted, as deputy sheriff and deputy collector, to R A, suits were brought on his bonds as such, and judgments obtained thereon. A few days before the judgments were obtained, A R conveyed the whole of his real and personal estate to A J and R B, who were sureties for A R in the bonds before mentioned. R A filed his bill against A R, A J and R B, charging that the conveyance was executed fraudulently, and with intent to deceive and injure him, and though apparently for a money consideration, was in truth executed to guarantee and indemnify A J and R B, as sureties in the bonds; that A R retains possession of the property, and has sold a part thereof for his own benefit. Prayer for a disclosure of the trusts and vacation of the deed, and for general relief. A J, in his answer, stated that A R was indebted to him for money paid as his surety to other persons, and also indebted to him on open account, and for money lent. *Held*, that the real and personal property, and increase, if any, remaining in the hands of A R, A J and R B, or any of them, be sold for the purpose of paying, in the first place, the sum of money due to R A. *Amoss v Robinson et al.* 320

25. Where a bill had been filed in the court of chancery, under which testimony was taken and returned, and the bill afterwards dismissed by the complainant, who filed a new bill against the same defendants to obtain the same relief for which the former bill was filed—*Held*, (on the petition of the defendants,) that the testimony so taken in the former suit be received and read in evidence in the new suit. *Hopkins v Stump et al.* 301

26. The court of chancery will not enforce a speculating contract for continental money. *Ib.* 304

27. The answer of a defendant to a bill in the court of chancery will prevail unless refuted by the testimony of two witnesses, or of one witness with equitable circumstances. *Ib.*

28. If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer *plainly, fully and explicitly.* If then any material matter charged in the bill has been neither denied nor admitted by the answer, it stands on hearing of the cause for *nought.* *Ib.*

29. If A has purchased land from B, and paid for it, without receiving a conveyance, or if B holds in trust for A, in either case A has an interest liable to be taken and sold on a *fieri facias*, and the purchaser is entitled to the aid of the court of chancery to obtain the legal title. *Ib.*

30. But if A has only contracted and given his bond for the purchase money of a tract of land, and received in return a bond of conveyance—Has A such an equitable interest as is liable to be sold on a *fieri facias* so as to place the purchaser in the room of A? *Ib.*

31. W D becoming an insolvent debtor, his real estate was sold by his trustee, and purchased by C D, to whom a deed was executed. C D, in making the purchase, acted professedly as a friend to W D, so far that if he could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he could not raise the money, it became necessary to sell a part of the premises to reimburse C D—which part W D, and M his wife, were desirous to preserve to themselves, and were anxious to procure a friend to become the purchaser for and on behalf of M the wife, and as a trustee for her. Which intention was, previous to the sale, made known to R W, who approved, and it was agreed that J S, (who consented,) should be the nominal purchaser, and R W was to become his surety for the payment of the purchase money. J S became the purchaser, and it was known and understood at the time, that he purchased for M, the wife of W D. In the bond for the purchase money R W became surety for J S, and possession of the premises had always been in W D, who procuring a part of the purchase money, applied to R W to obtain a bond of conveyance from C D to M the wife, for the property, when he was informed by R W that he had got a bond to himself, as J S had given it all up to him, and that W D had nothing to do with it. J S had been induced, in order to secure R W, to direct C D to give a bond of conveyance to R W, who assured J S that no advantage should be taken of W D, and that when he paid the pur-

chase money, a deed should be executed to his wife M. The premises were conveyed by C D to R W, who brought an ejectment against W D. The amount of principal and interest of the purchase money was tendered by W D to R W, and a deed demanded, which he refused. W D, and M his wife, filed their bill against R W, to be quieted in their possession of the premises, and to compel a conveyance from him to M the wife—*Decreed*, that R W convey the land in question to W D, and M his wife, in fee simple, and that an account be stated, &c. and the balance due be paid at the time R W shall convey the land. *Davis et ux. v Walsh*, 329

32. A bill in chancery, with all the proceedings and the decree thereon, cannot be read in evidence in a case between different parties from those named in the proceedings. *Dorsey v Gassaway*, 409

33. N H contracted with, and for a valuable consideration conveyed to J S, by metes and bounds, 806 acres, part of a tract of land "situate, lying and being, in the state of *Kentucky*, in the county of *Bourbon*, and *on the main branch of Licking*." A grant of the land described it as "lying and being in the county of *Bourbon*, *on the main branch of Licking*, in the state of *Virginia*." After the grant of the land, a new state, by the name of *Kentucky*, was formed from *Virginia*, and the county of *Bourbon* became a part of *Kentucky*, which county was afterwards divided, and two new counties erected, called *Clarke* and *Mason* counties, and the land now lies in those two counties. J S filed his bill in chancery to have the contract vacated, and the consideration money repaid to him, &c. *Decreed*, that his bill be dismissed. *Hammond v Sappington*, 446

34. A H being entitled to a lot of ground, but ignorant of his right, was induced, as he alleged, by the fraud and imposition of the agent of B B, in 1791, to execute a conveyance to B B for the lot on a small consideration. He filed his bill in chancery in 1798, to have the conveyance vacated, &c. The answers of B B's representatives, and the agent, denied all fraud, &c. *Decreed*, that as it does not appear that a fraud was perpetrated, or if it was, that B B was a contriver or privy to, or partaker of it; as the complainant suffered many years to elapse before he filed his bill; as the property hath since been greatly improved and changed, and hath devolved on several representatives: as the argument from convenience, ought always to have influence, the complainant is not entitled to recover. Bill dismissed. *Hamilton v Beall, et al.* 414

35. T F and B F, being seized as tenants in common, under the act to direct descents, with S S, of and in, (among others,) of a lot of ground, contracted separately with G R, and agreed to convey to him all their interests therein, on the payment to each of them of $300; and the money being paid, possession of the lot was delivered to G R, who after the death of T and B F, filed a bill in chancery against S S, she being their heir at law, for a specific performance of the contract. S S by her answer, alleged that both T and B F were in habits of intemperance, and were almost constantly in a state of intoxication. That the lot was contracted to be sold by them when in a state of intoxication, or when they were incapable of transacting business, at a price greatly below its value, &c.—*Decreed*, that S S convey to G R one undivided third part of the lot of ground; but as to the contract of B F, on account of the satisfactory proof of his imbecility, it ought not to be enforced; and that G R deliver to, or permit, S S to take or enjoy two undivided third parts of the lot of ground, without her refunding the consideration paid by him to B F. *Reinicker v Smith*, 421

36. Whether or not the answer of one of the defendants to a bill in chancery, is evidence against another defendant? *Williams v Hodgson*, 474

37. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is, by operation of law, a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Ib.*

38. —— Ignorance of the law as to consequences resulting from a creditor's accepting the bond of one of the partners for a simple contract debt due from the partnership, cannot excuse or form a ground for relief in equity. *Ib.*

39. —— Such a bond although not binding on the partner who did not execute it, is obligatory on the partner who did execute it. *Ib.*

40. Where a bill was filed in chancery

to set aside and annul a decree, before obtained by the defendant against the complainant, on the ground of fraud practised by the defendant in obtaining that decree, there appearing to be no evidence of fraud, the bill was dismissed, but *without costs*. On an appeal to the court of appeals by the *complainant*, that court *affirmed* so much of the decree as dismissed the bill, but *reversed* that part of it which directed that the dismissal should be *without costs*, and decreed that the appellant pay to the appellee his costs incurred in both courts. *Hoffman v Baker*, 486

41. Fraud may be inquired into as well at law as in equity; and where frauds are clearly established, the courts of law, and a court of chancery, have concurrent jurisdiction. *Singery v The Attorney-General*, 487

42. On a bill in chancery for vacating a certificate of survey and grant of the land, on the ground of a fraud committed by a forgery of the certificate —*Held*, that the court of chancery had jurisdiction, although the question of forgery of the same certificate had, in an action of ejectment between the same parties, come collaterally before a court of law and jury, and the court admitted evidence to establish the forgery, and the jury gave their verdict in favour of the defendant, who claimed under the certificate alleged to be forged. *Ib.*

43. Although on a bill in chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet that court has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant, &c. from whence the injury has arisen, or will make such decree as the circumstances of the case render necessary. *Ib.*

44. The forgery of a certificate of survey, and the fraud consequent thereon, being fully established—*Decreed*, that the defendant, (claiming under such certificate and the grant thereon,) should convey to the complainant all that part of the land held by him under his grant above mentioned, which is comprehended in the lines of the land granted to the complainant. *Ib.*

45. W P being seized of a tract of land called *P D*, containing 275 acres, executed a bond of conveyance to J C, conditioned that he would convey to him, all his right, &c. "of, in and to, 120 acres of land called *P D*, situate, lying and being, in the county of B, with the appurtenances thereunto belonging or appertaining, now in the possession or occupation of the said W P." On a bill in chancery for a specific performance, &c.—*Held*, that there being no designation of the 120 acres of land, nor any description whereby it could be identified and located, parol evidence is not admissible to show that it was intended by the parties that the 120 acres were to be laid off at the southernmost part of the tract. That the bond is void for uncertainty, except on the principle of election; and there is no evidence to prove that there was any election made by either of the parties anterior to the time of the execution of the deed from W P for part of the tract described by metes and bounds, to one of the defendants, who was a *bona fide* purchaser of the land conveyed to him, without notice that there was any designation of the 120 acres. *Huntt & Parks v Gist, et al.* 498

46. A complainant is not entitled to relief in equity against the executors of a joint obligor, who was a surety in the bond. Per *Hanson*, Chan. *Williams v Hodgson*, 474, *(note)*

See Abatement 2.
—— Grant 25, 41.
—— Injunction 1.
—— Preference 1, 2.
—— Surety 2.

COVENANT.

1. In an action of covenant brought on the 11th of February 1799, upon an agreement executed on the 18th of March 1796, between M (the plaintiff,) and G (the defendant,) stipulating, *inter alia*, that a complete merchant mill should be built by M, of materials to be provided by G, who was also to provide a framed or hewed logged dwelling-house at the mill, for M to reside in, and M agreed that he would take up his residence at the mill in the dwelling house, and would act as the manager and superintendant of the mill, which was to be worked for the joint benefit of M and G in equal parts; that is to say, M to receive one half of the net profits, and G the other half. The copartnership to commence as soon as the mill should be ready to do work, and continue for ten years. That a regular set of books should be kept,

which should contain all the transactions of the copartnership, and a settlement should be effected at the end of every year. The firewood should be furnished from the farm on which G resided, for the use of two fire places in the mill and dwelling-house, at the equal cost of the parties for cutting and hauling it to the houses; and 12 acres of land, including two acres of bottom land, most convenient to M, to be put under good and sufficient fence for his use. The declaration averred, that the mill was completed on the *21st of June* 1798, and that M performed, &c. The breach assigned was, that G, did on the 31st of January 1799, forcibly eject M from the mill and premises, and still keeps him out. That G did not provide a framed or hewed logged dwelling-house at the mill, for M to reside in. That G, on the day and year last aforesaid, after the mill was complete and put into complete motion, did prevent M from receiving one half of the net profits of the mill, but that G did, contrary to the consent of M, receive the whole of the profits from the day and year last aforesaid, until the bringing of this action, and hath refused to pay any part thereof to M. Nor did G furnish M with 12 acres of land, including two acres of bottom land most convenient to M, under good and sufficient fence, for M's use. The witness to the agreement was offered by G to prove what took place between the parties previous to and at the time of the agreement, as to their intention and meaning in the agreement; also another witness, who proved that when he was at work upon the dam for the mill, he received orders from G to build the dwelling-house for M, but that M told him to continue to work at the dam, and not mind the house, as he could make shift with the counting room in the mill, which he occupied, and declared that it answered his purpose very well, and that there was no occasion to build the dwelling-house until it suited the convenience of G. *Held*, that the construction of the agreement is a matter of law to be determined by the court. That parol evidence may be admitted to explain doubtful parts, but no evidence can be admitted to prove the agreement different, or to prove any additional agreement not included in or touched upon in the agreement. That the evidence offered did not dissolve or extinguish the contract, or bar the plaintiff's cause, or right of action against the defendant, for the breach in not building the house; that it was only a consent to a temporary suspension of the building of the dwelling-house, and is only proper in mitigation of damages. *Morrison v Galloway*, 464

2. —— *Held* also, that at the time of bringing the action, the plaintiff had a cause of action, being deprived of the benefits under the contract. *Ib.* 466

3. —— *Held* also, that the covenant, on the part of the defendant, that the plaintiff should receive one half of the profits of the mill, is an independent covenant; and that it was not incumbent on the plaintiff, to entitle himself to a recovery, to prove a compliance with, or fulfilment of, every stipulation in the covenant on his part to be performed. *Ib.* 467

4. —— *Held* also, that it was not necessary for the plaintiff, in order to support his action, to prove that he took up his residence at the mill, and superintended the same as miller, and devoted his time and attention to the mill in such manner as is usual for men under wages to do particular work; that he kept a regular set of books, in which were contained all the transactions of the copartnership, and that he effected a settlement of the partnership accounts at the end of the year 1798, or that he was prevented from doing so by the defendant. That it was only necessary for the plaintiff to prove that he did enter upon the management and superintendence of the mill, according to the covenant, and did work and manage the same. *Ib.*

5. —— *Held* also, that for withholding from the plaintiff the one half of the profits of the mill, he could only recover therefor, from the time when such withholding of the profits first commenced, down to the time when the action was brought. *Ib.* 468

6. —— *Held* also, that the plaintiff might recover damages for one half of the net profits of the mill down to the time of bringing the action, only; and damages for the ejecting and turning him out of the possession of the mill, and for all advantages and benefits which might attend or result from the possession thereof, during the unexpired term of ten years, not compre-

bended within the net profits of the mill; and that an action or actions may be brought by the plaintiff against the defendant for one half of the net profits which might have been made, or may be made, from working the mill under the contract, from the 11th of February 1799, during the continuance of the partnership under the same. *Ib.*

7. —— *Held* also, that this being an action founded on contract, the plaintiff had only a right to recover damages for the actual loss, injury and inconvenience, by him sustained by occasion of the breaches of covenant assigned by him, (exclusive of his part of the profits of the mill,) according to the whole of the circumstances existing in the case, without reference to the force, if any, with which the plaintiff was dispossessed. *Ib.* 469

8. —— *Held* also, that it was no ground to arrest the judgment upon the verdict, (which was for the plaintiff,) because the declaration stated as a breach on the part of the defendant, the not enclosing the twelve acres of land, &c. *Ib.*

CREDIBILITY.

1. The letters of a witness permitted to be read in evidence to impeach his credit as to what he had sworn upon his examination taken under a commission, contradictory to the contents of the letters; but not to prove any other fact. *De Sobry v De Laistre*, 219, 220

CREDIT.

See Attachment 3.

CREDITOR.

1. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors. *De Sobry v Terrier*, 224

2. Whatever fund in this state is answerable for debts, is answerable to all creditors alike, according to the laws of the state. *Ib.*

3. Unless the jury are satisfied, according to the laws of *France*, that a coheir, with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, then the plaintiff, (who is coheir and creditor,) is entitled to recover whatever the jury may find due on the contract made in *France*, according to the laws of *France*. *Ib.* 228

See Bequest 1.
—— Cestui Que Use 2.
—— Foreigners 1.
—— French Laws 1, 2.
—— Preference 1, 2, 3.

CRIMINAL PROSECUTION.

1. A *Faro table* set up in a house, not a dwelling-house, out house, or place occupied by a tavern keeper, retailer, &c. is not an offence under the act of 1797, *ch.* 110, which directs that "no *faro table*," &c. "shall be set up, kept or maintained, in any dwelling-house, out house, or place occupied by any tavern keeper, retailer," &c. *Baker v The State*, 5

2. Whether or not the court can refuse to permit the counsel in a criminal case from arguing to the jury against the court's construction of an act of assembly, after the court had been called upon to give a construction to the act? *Quere.* *Ibid.*

3. An indictment containing two counts, one charging *felony*, and the other a *misdemeanor*, was held to be good. *Burk v The State*, 426

4. After the prisoner has pleaded generally to an indictment having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other, *Ib.*

5. When nine jurors are sworn in a criminal case, and the rest of the original pannel is exhausted by peremptory challenges, the court can legally award an order for the summoning only three talesmen, and when eleven are sworn, to summon but one. *Ib.*

6. As to the manner of awarding a *venire* for summoning talesmen in criminal cases, capital. *Ib.*

7. As to the joinder of offences in criminal cases, and the joinder of causes of actions in civil cases. *Ib.*

See Indictment.

CROP.

See Overseer 1.

CURRENT MONEY.

See Court of Chancery 3.
—— Mortgage 1, 2.

D.

DAMAGES.

1. In an action of replevin the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained. *Dorsey v Gassaway*, 413

See Covenant.
—— Declaration 3.
—— Dower 1, 4.
—— Replevin 1.

DATE.

See Promissory Note 2.

DAY BOOK.

See Evidence 8.

DEBT.

See Application of Payments 1.
—— Bequest 1.
—— Discount 2, 4.
—— Extinguishment 1.
—— Release 1.

DEBTOR AND CREDITOR.

See Extinguishment 1.
—— Release 1.

DECLARATION.

1. A judgment of the court below upon a general verdict in *assumpsit*, was reversed because there was one count in the declaration to which the evidence did not apply. *Grant v Ridsdale et al.* 186
2. A declaration containing sundry counts on a letter of credit or guaranty, some of which were held to be bad. *Ib.*
3. A declaration in replevin, omitting to allege a damage, is fatal. *Fugel v Brayton*, 350

See Covenant 8.
—— Dower 1.
—— Joinder of Actions 1.
—— Replevin 1, 2.
—— Slander 1, 2.

DECLARATIONS.

1. Certain acts and declarations of the defendant, subsequent to his sale of the slave for which an action of replevin was brought, and before his insolvency, are not evidence to defeat the claim of the plaintiff. *Dorsey v Gassaway*, 408
2. Where the answer to a bill in chancery was made by the respondents therein, from information derived from the present defendant, although the answer is not admissible in evidence, yet the declarations of the defendant are; and a witness may recur to the answer to refresh his memory, as to the declarations made to him by the defendant *Ib.* 410
3. Declarations made by the defendant before and after his discharge under an insolvent law, may be given in evidence against him. *Ib.* 410, 412

See Evidence 12, 64, 75.
—— Hearsay Evidence.

DECREE.

1. A bill filed in chancery to set aside and annul a decree obtained by fraud. See Fraud 3, and *Hoffman v Baker*, 487

See Court of Chancery 15.
—— Enrolment.
—— Evidence 59, 78.
—— Reversal 1.

DEED.

1. Parol evidence not admitted to prove that a deed of manumission was attested in the presence of two witnesses where one only subscribed his name thereto. *Negro James v Guither*, 176

See Conveyance.
—— Inspeximus 1.

DEFECTIVE DEED.

See Acknowledgment of Deeds.
—— Presumption 3.

DEFECTIVE TITLE.

See Grant 7.
—— Presumption 3.

DELIVERY.

See Evidence 8.
—— Non Est Factum 1.

DEMURRER.

1. A general demurrer to a declaration in dower being overruled, judgment was entered for the demandant for dower and costs. *Keefer v Young*, 53 (note.)

DEPARTURE IN PLEADING.

See Pleading 1.

DEPENDENT COVENANT.

See Covenant 3, 4, 8.

DEPOSITION.

1. The deposition of a witness taken on the survey of the lands in dispute, permitted to be read in evidence at the trial, the witness being out of the state, and due diligence having been

used to procure his attendance. *Howard v Moale et al. Lessee,* 272
2. The deposition of a witness to be taken under the act of July 1779, *ch.* 8, to perpetuate testimony. See RESIDENCE 2, and
Bryden v Taylor, 396
See Commission and Commissioners 4, 5.

DEPUTY CLERK.
See Clerk 1.

DESCENDANTS.
See Evidence 56.

DESCENTS.
See Estate Tail 10.
—— Tenant in Common 1.

DESCRIPTION.
1. Whether or not lands seized under a *fieri facias* are sufficiently described in the sheriff's return thereof? See FIERI FACIAS 2, and
M'Elderry v Smith's Lessee, 72
2. If there are two descriptions of the land granted, the one by name and the other by metes and bounds, the grant will operate to pass the land according to that description which is most beneficial to the grantee. *Hall v Gittings, Jr's Lessee,* 117
3. An escheat grant operates to pass the whole of the original tract escheated. *Ib*
4. As to a variance between a description of land contracted to be sold and conveyed, and that used in a grant of the land, see COURT OF CHANCERY 33, and
Hammond v Sappington, 446
5. There being no designation of part of a tract of land contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner, and the bond is void for uncertainty, except on the principle of election. *Huntt & Parks v Gist, et al.* 498
See Evidence 24.

DESIGNATION.
1. There being no designation of part of a tract of land contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner, and the bond is void for uncertainty, except on the principle of election. *Huntt & Parks v Gist et al.* 498

DEVASTAVIT.
See Executors and Administrators 7.

DEVISE.
1. A devise of lands to a creditor does not extinguish the debt or claim which he has against the testator. *Partridge v Partridge,* 63
2. The following devise created an estate tail in the devisee, viz. "I give and devise to my son R L, all that land called," &c. "to him and his heirs for ever; and in case he dies without heirs, to my son J L, and the heirs of his body lawfully begotten." *Laidler v Young's Lessee,* 69
3. An estate tail cannot be devised under the act of 1782, *ch.* 23. *Ib.*
4. A will containing the following devise, viz. "I give and bequeath to my sister E W, all my real estate, during her natural life, and after her decease to my nephew T W, and his heirs lawfully begotten; but in case my said nephew should die before he arrives to the age of 21, *or* leaving issue lawfully begotten, then, &c. T W arrived to the age of 21 years, and died without issue—*Held,* that the estate tail was docked by the deed from T W to W B, although W B was declared to hold the land in trust for T W; and those claiming under him. *Brogden v Walker's Ex'r. &c.* 285
5. T T by his will dated in 1795, devised his lands to be equally divided between his two nephews W C and W S, to them and their heirs for ever; and in case W C died without lawful issue, then devised one half of the said lands to his nephew G S, to him and his heirs for ever. *Held,* as to a moiety of the lands devised to W C, that on his death without lawful issue, the estate tail became extinct, and the limitation over to G S took effect, and one moiety of the lands vested in him in fee simple. *Smith et al. v Smith et al.* 314
6. R H by his will devised as follows, viz. "I give and bequeath unto my dearly beloved son C H, the free use of my land called," &c. "with all the houses," &c. "*during his natural life,* to occupy and enjoy the same; and after the decease of my son C H, I give and bequeath the said land," &c. "with all the houses," &c. "unto the heirs of my son C H, lawfully begotten of his body for ever; and for want of such heirs, I give," &c. *Held,* by the county court, that

under this devise, C H took an estate intail general. *Keys & Horn v Goldsborough's Lessee*, 371
See Executory Devise.

DILIGENCE.
See Deposition 1.
—— Evidence 48.

DISAFFIRM.
See Acts 1, 2.

DISCHARGE.
See Insolvent Debtor 1, 2.

DISCOUNT.
1. The defendant may set off, against the plaintiff's demand, a note of the plaintiff's accrued subsequent to the commencement of the action. *Clarke v Magruder et al.* 77
2. A debt or demand may be set off, or pleaded in discount, although such debt or demand was not subsisting at the time the action was brought. *Ib.*
3. In an action of trover for corn placed in the warehouse of the defendants on storage, and which they refused to deliver, but claimed to retain it for the payment of a debt due to them from the plaintiff, for articles sold and delivered—*Held*, that as there was no evidence that the corn was delivered to the defendants to be applied by them to the discharge of the debt due by the plaintiff to them, or was placed in their hands as factors, with authority to sell the same, the plaintiff was entitled to recover. *Levering v Bond's Adm'r.* 300
4. The defendant, as surety for F B in a bond for the payment of money given to the plaintiff as trustee for the sale of an estate, having pleaded payment, at trial offered to file an account in bar, claiming in the name of F B a sum of money due to him as his proportion of the amount of the sales of the estate—*Held*, that the account could not be filed. *Gantt v Bowie's Adm'r.* 371
See Court of Chancery 15.
—— Evidence 59.

DISTRIBUTEE & DISTRIBUTION.
1. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made, and as long as assets remain in the hands of such executor he is answerable to the creditors; and if there is any surplus it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled. *De Sobry v Tcerier*, 224
2. Personal property adheres to the person; and wherever the testator is domicil at the time of his death, the property is to be distributed according to the laws of that country. *Ib.*
3. No part of the personal estate of a testator, dying in *France*, is subject to distribution among his coheirs, but the surplus or residuum remaining after the payment of all his debts and legacies. *Ib.* 228
See Evidence 3.

DOMICIL.
See Contract 9.
—— Distribution 1, 2.
—— Foreign Laws 4.
—— French Laws 1, 2.
—— Intestate's Estate 1, 2.
—— Testator 1, 2.

DORMANT PARTNER.
See Partner and Partnership 1.

DORMANT TITLE.
See Possession 5.

DOWER.
1. In an action of dower it is not necessary to lay any damages in the declaration. *Keefer v Young*, 53
2. Parol evidence admitted to prove that the land granted to the husband of the demandant is the same land of which dower is demanded. *Ib.*
3. A demurrer to a declaration in dower being overruled, judgment was entered for dower and costs. *Ib. (note)*
4. In an action of dower a judgment was confessed for the demandant's dower claimed in the lands. A writ of *habere facias seisinam* issued, and the demandant's dower laid off. On the return of the writ, the county court entered judgment for nominal damages, and costs. On appeal, the judgment for the damages and costs was reversed. *Hammond v Higgins, et ux.* 448

DRUNKENNESS.
See Court of Chancery 35.

DUE DILIGENCE.
See Deposition 1.
—— Evidence 48.

E.

EJECTMENT.

1. An equitable title in the defendant to lands, will not prevent a recovery against him in an action of ejectment brought by a person having the legal title. *Saunders, et ux. v Simpson, et ux.* 82, *(note)*

2. Whether or not twenty years exclusive and unmixed possession of a tract of land by cultivation and general use, without an actual enclosure, is such a possession as will bar a recovery in an action of ejectment? *Quere. Cheney v Ringgold, et al. Lessee,* 87

3. Whether or not twenty years possession of a part of a tract of land by actual cultivation and enclosure, with an exclusive and unmixed enjoyment of all exterior to the enclosure, by sparsim cutting and general user, will bar a recovery in ejectment of the parts not enclosed? *Quere. Ib.*

4. Where the plaintiff with title, having possession by enclosure and cultivation of a part of a tract of land, claiming the whole, and the defendant, without title, having possession by enclosure of a part of the same tract, with the use (by cutting timber, &c.) of the other parts not inclosed, the plaintiff is bound by the act of limitations as to that part of the land which is in the possession of the defendant by actual enclosure for more than twenty years next preceding the bringing his ejectment, but not as to the parts used by the defendant exterior to the enclosure. *Ib.*

5. When two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him having the title, as in possession to the extent of his right. *Ib.*

6. The act of limitations did not attach or run against the Lord Proprietary on any possession of vacant lands. *Ib.*

7. If the testimony of a witness interested is intended to be objected to because of his holding adjoining land, his interest must be located on the plots. *Hall v Gittings jr's. Lessee,* 120

8. The declarations of a former holder of adjoining lands, as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plots that he was interested in establishing the facts related by him. *Ib.* 121

9. In an action of ejectment the plaintiff must recover on the strength of his own title. *Ib.* 122

10. The defendant in ejectment may prevent the plaintiff from recovering, by showing a title in himself, or a clear subsisting title in a stranger. *Ib.*

11. A clear subsisting title outstanding in another, means such a title as a stranger could recover on in ejectment against either of the contending parties. *Ib.*

12. Possession is presumptive evidence of right, and a defendant in ejectment cannot be deprived of his possession by any person but the rightful owner of the land—that is, he who hath the *jus possessionis*. *Ib.*

13. Nothing but twenty years adverse possession can defeat a title acquired under a legal grant. *Ib.*

14. The jury were directed, that if they believed certain facts, then the presumption of law was, that *J S*, to whom the land in dispute was granted in 1684, was seized thereof, at the time of his will in 1683, and his death, in 1685, and no presumption could arise from the said facts, that he was not so seized. *Ib.* 126

15. Where the plaintiff has made but one location on the plots, of the beginning of the tract of land for which the ejectment is brought, and that is counterlocated, the jury cannot, by reversing lines, &c. ascertain by their verdict a different beginning for the plaintiff than that located by him. *Hammond, et al. Lessee v Norris,* 148

16. The plaintiff in ejectment must make such locations of the land on the plots as will suit his case. *Ib.*

17. —— The jury cannot find a location of their own, but if they find for the plaintiff, they must find some one of his locations on the plots. *Ib.*

18. If the beginning of a tract of land is lost or cannot be proved, then the beginning is to be found by reversing the lines of the tract from the first known and established boundary. *Ib.* 149

19. A person out of possession for more than twenty years, where there is not an adversary possession in virtue of some right or by actual enclosures, his heir, or a person claiming under him, may bring an ejectment without actual entry into the land. *Hammond, et al. Lessee v Warfield,* 156

20. A naked possession, (possession without right,) is only adversary to the extent of actual enclosures. *Ib.*

21. To entitle the party to the benefit of the relation of his patent to the certificate of survey, it is incumbent on him to show an equity; and the

producing copies, under seal, of the warrant, certificate and grant, is not sufficient to entitle him to such benefit. *Ib.* 158

22. The time when a certificate of survey was returned to the land office is a matter of fact determinable by the jury. *Ib.* 159

23. Certain facts and circumstances not admissible in evidence to prove at what time a certificate of survey was returned to the land office. *Ib.*

24. The actings and doings of a person under whom the party does not claim, not permitted to be given in evidence. *Ib.*

25. A mortgagor cannot support an ejectment for the land mortgaged, unless he can show that the mortgage had been satisfied previous to the time of bringing the ejectment. *Beall, et al. Lessee v Harwood,* 172

26. In an action of ejectment brought by the lessee of the *Vestry of a Parish*, the plaintiff offered to read in evidence certain entries in a book purporting to be, and proved by a witness, who was formerly register of the vestry, to be handed down to him as the vestry book of the parish—*Held*, that the testimony was improper, and ought not to be read in evidence. *Martin & Smith v Gunby, et al. Lessee,* 248

27. The death of *one of the* lessors of the plaintiff in an action of ejectment, may be suggested after the jury are sworn, and his heir, &c. need not appear, or be made a party. *Howard v Moale, et al. Lessee,* 249

28. Where the first and second courses of an original grant of a tract of land called *D F*, are described as "beginning at a bounded locust tree, being the N E bounded tree of *D P's* land, [called *U C*] and running by the land of the said *P*, E 65 ps to a bounded oak, then N E 150 ps to a bounded red oak of the said *P's* land;" and the first and second courses of an escheat grant of the same land called *D F*, is described as "beginning at a locust, now bounded at or very near to the place where stood a bounded locust, the original beginning tree of *D F*, and a bounded tree of a tract of land called *U C*, formerly laid out for *D P*, and running thence with the said land, E 65 ps (it being expressed in the certificate of the original survey to run by the land of the said *P*, E 65 ps to a bounded red oak, which cannot be found,) thence N E 238 ps still bounding on the said land, to the N W branch of *Patapsco* river, (it being therein expressed to run N E 150 ps to a bounded red oak of the said *P's* land, and the certificate of the said *P's* land mentioning to run that course to a bounded red oak standing by the side of the said N W branch, which oak is not known")—*Held*, that there was no doubt or ambiguity, and that if the beginning of *D F* is rightly located on the plots in the cause at the termination of the twelfth line of *U C*, and there is no evidence of the existence of any tree, as called for at the termination of the first line of *D F*, then the expressions in the escheat grant do bind that grant to the true location of the original tract called *D F*, as to the two first lines thereof, so far as the second line of the original did actually extend; and that the first and second lines of the original tract do, by virtue of the expressions therein used, bind those lines on the thirteenth and fourteenth lines of *U C*. *Ib.* 263

29. Where the plaintiff has not located his escheat grant on the plots in the cause co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant; but he is estopped by that location from going beyond the letter *V*, located on the plots, from whence he must run to the head of *Howard's* branch, at whatever point the same may be, agreeably to his location of his pretensions, and the location by which the defendant has taken defence. *Ib.* 266

30. The plaintiff cannot give any evidence of the lines of his escheat grant running otherwise than he has located them on the plots as his pretensions; but he is not precluded from giving evidence of any other lines, as the lines of the original tract, by way of illustration; and he may support the location of his pretensions, so far as he can show that they are located within the limits of the original tract; *Ib.* 266

31. The court refused to direct the jury that an escheat grant did not pass any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not by legal operation convey all the land included within the original grant, unless

the particular metes and bounds of the escheat grant did also include them. *Ib.* 271

32. The court directed the jury, that they may find the true location of the tract of land called D F, for which the ejectment was brought, by a greater or less variation of the compass as may appear to them proper from the evidence, provided that by such allowance of variation they do not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions on the plots, or beyond a straight line to be drawn from the letter V to the head of *Howard's* Branch, *Ib.* 274

33. The court directed the jury, that the plaintiff could not recover any land which should be found to lie without and beyond a straight line to be drawn from the letter V on the plots, to the head of *Howard's* Branch, (he having located that line of his grant in that manner,) altho' those lands should lie within the lines of the tract of land for which the ejectment is brought, and also within the lines of the plaintiff's pretensions, as located on the plots. *Ib.* 275

34. The court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land for which the ejectment is brought, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from that given by the plaintiff. *Ib.*

35. The jury, by their verdict in an action of ejectment, having found the true location of the land, for which the ejectment was brought, to be from the letter *A* to *a*, to 3, to *four perches below* big *F*, the head of *Howard's* Branch, and then to *A*; they also found for the plaintiff his pretensions, (not being to the extent of the said location,) to be from *A* to *a*, to *v*, to *four perches below* big *F*, the head of *Howard's* Branch, and then to *A*, and that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land. *Held*, that there was uncertainty in the verdict. *Ib.* 276

36. A private plot of the lands in dispute, permitted, under certain circumstances, to be read in evidence, *Ib.* 268

37. A deposition taken on the survey, of a witness, who was absent out of the state at the time of the trial, was permitted to be read in evidence, due diligence having been used to obtain the attendance of the witness. *Ib.* 272

38. Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person under whom the plaintiff claimed died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—the strongest presumption of a good title being in favour of the defendant. *Davis's Lessee v Davis's Heirs*, 295

40. A P by his will devised to C C & A M all his real estate to be sold by them for the payment of his debts. Evidence of a sale made at auction by them to W G of a part of the real estate, together with a memorandum of the sale subscribed by the auctioneer, and a receipt given by them for the purchase money—*Held*, to be admissible and competent to show a title at law in W G, without a deed of bargain and sale, or other conveyance to him from the trustees, and to be sufficient to enable his lessee to recover the lands in an action of ejectment. *Keys & Horn v Goldsborough's Lessee*, 369

41. Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence if the whole tract is united in the same person, and the whole has been located. *Hall v Gittings's Lessee*, 382

42. If the possession of land has gone agreeably to an ancient deed which needed no enrolment, the *inspeximus* of the deed may be read in evidence, and is effectual to pass the land, *Ib.* 380

43. A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her, having been declared to be defective, was admitted to give evidence on the part of the defendant in an action of ejectment brought for the same land by a person claiming under her deed, *Ib.* 386, *(note)*

44. Where the defendant in an action of ejectment was in possession of 100 acres of land by enclosures and cultivation for 15 years, and then enlarged his enclosures, so as to include 150 acres, and he possessed the same, so enlarged by enclosures, for 6 years thereafter, claiming the same as his

his own—*Held*, that he had title to the 100 acres by adversary possession. *Ib.* 390

45. Where the expressions used in a grant of land described it as "lying on the ridge of Gunpowder river, beginning at a bounded oak, being the westernmost bounds of a tract of land laid out for M S, and running W 500 ps. to a bounded oak *standing by the great falls*, and running N from the said oak," &c. *Held*, that they do not operate to bind the first line to terminate at the great falls, although no evidence is given of the tree or place where it stood. *Ib.* 392

46. The declarations of a deceased person, then seized of a particular tract of land, not located on the plots in the cause, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant. *Held*, that the declarations were not admissible in evidence. *Ib.* 393

47. In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, part of a tract of land called *H F*, the jury by their verdict found the true location of that tract, and also the locations of other tracts for which the defendant took defence. They also found for the plaintiff all the land called *H F*, as located by them, which lies clear of the other tracts so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and J S, from a particular point to another. *Held*, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action. *Ib.*

48. A surveyor's original book of surveys, and his parol testimony, admitted by the general court, in an action of ejectment, as competent evidence to prove that a certificate of survey returned to the land office was forged. *Boring's Lessee v Simgery*, 455

See Fraud 4, 5, 6.
—— Location of Lands.
—— Presumption 2, 3.
—— Verdict 6 7.

ELECTION.

1. There being no designation of part of a tract of land, contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner; and the bond is void for uncertainty, except on the principle of election. *Hantt and Parks v Gist et al.* 498

See Cause of Action 1.
—— Court of Chancery 45.
—— Practice 2.

ENCLOSURE.

See Ejectment 2, 3, 4.
—— Limitation of Actions 2, 7, 8, 11.
—— Possession 3, 4, 8.
—— Trespass 5.

ENROLMENT.

See Bill of Sale 1.
—— Conveyance 4, 5.
—— Court of Chancery 9, 10, 11, 18.
—— Estate Tail 8.
—— Evidence 10, 56, 61.
—— Inspeximus 1.
—— Lease and Release.

ENTRIES.

See Evidence 8, 31, 46, 56.
—— Presumption 2.

ENTRY.

1. A person out of possession for more than twenty years, where there is not an adversary possession in virtue of right or by actual enclosures, his heir, or person claiming under him, may bring an ejectment without an actual entry into the land. *Hammond et al. Lessee v. Warfield*, 156

See Confiscation 2, 4, 5, 6.
—— Escheat 7.
—— Office Found 1.

ENURE.

See Acts 2.
—— Vendor and Vendee 1.

EQUITABLE ASSIGNMENT.

See Court of Chancery 5.

EQUITABLE ESTATE.

1. Where a person, having the equitable interest, is in possession of the land, yet if his equitable interest is not known, it will not prevail, if established, over the legal estate commencing subsequent to the equitable interest. *Dunnison v Robinett, et al.* 55

2. A contract for the purchase of land, *bona fide* made for a valuable consideration, vests the equitable interest

in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid, the vendee is entitled to a conveyance. A judgment obtained by a third person against the vendor, *mesne* the making the contract and the payment of the money, cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*. *Hampson v Edelen*, 64

3. An equitable estate in the defendant to lands, will not prevent a recovery against him in an action of ejectment brought by a person having the legal title. *Saunders, et ux. v Simpson, et ux.* 82, *(note)*

4. By the acts of confiscation, the equitable interests of *British* subjects in lands in this state, were confiscated without *office found*, or entry, or other act done, and although such equitable interests were not discovered until long after the treaty of peace between *Great-Britain* and the *United States*. *Smith, et al. v The State*, 471

See Ejectment 25, 40.
—— Fieri Facias 4, 5, 6.
—— Grant 22, 26.
—— Judgment 8.
—— Proprietary 4.
—— Trust & Trustee 2, 3.
—— Vendor & Vendee 1.

EQUITY.

See Court of Chancery.

EQUITY OF REDEMPTION.

1. Where an absolute deed of conveyance of land and personal property was held to be intended to secure the payment of a debt, and the party permitted to redeem, &c. See COURT OF CHANCERY 20, and
Brogden v Walker's Ex'r. &c. 235

See Court of Chancery 3, 20.
—— Mortgage 2, 3, 5, 6.

ERROR.

See Writ of Error.

ESCHEAT.

1. If the heirs of J S, in whom was the title to a tract of land, were living in *Great Britain* at the passage of the acts of confiscation, then an escheat warrant issued to E N for the same land, issued without authority of law; but a grant to him for the land surveyed under that warrant, came within the provisions of the 8th *sect.* of the act of *Nov.* 1781, *ch.* 20. *Owings v Norwood's Lessee*, 96

2. —— Such grant is valid to pass the land to E N, notwithstanding he had not paid more than two thirds of the appraised value of the land. *Ib.*

3. Lands liable to confiscation, may be granted by the state, under an escheat warrant. *Ib.*

4. —— Such escheat grant will operate by relation so as to give title from the date of the warrant of escheat. *Ib.*

5. —— The 8th *sect.* of the act of *Nov.* 1781, *ch.* 20, secured the land so escheated to the party, on his paying two thirds of the value. *Ib.*

6. Where the court would not direct the jury that the plaintiff's escheat grant did not pass the land, the defendant claiming the same under a defective title. *Ib.*

7. Lands escheated to the state vests without office found or an actual entry. *Hall v Gittings Jun'rs Lessee*, 112

8. The act of confiscation vested the seizin and possession of all lands liable to confiscation in the commissioners, on behalf of the state, and divested the possession of all other persons. *Ib.*

9. If lands, liable to escheat, are included in a certificate of survey and grant under an escheat warrant on another tract of land, such grant will operate to convey a good title to the land so included, if there has been possession for more than twenty years, &c. *Ib.* 115

10. Land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract of land, but which afterwards became escheat, will not pass under such grant, and the state is not estopped from granting it to any other person. *Ib.*

11. An escheat grant relates to the original grant. *Hall v Gittings Jun'rs. Lessee*, 115, 117
Howard v Moale et al. Lessee, 260, 263

12. An escheat grant operates to pass the whole of the original tract escheated. *Ib.*

13. The jury were directed, on certain evidence of title and descent, that land which had been granted as escheat land was not liable to be escheated. *Hall v Gittings Jun'rs. Lessee*, 122

14. Land is not escheatable as long as

there are heirs of the original tenant or grantee. *Ib.*

15. Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee, and he cannot grant the land again until that event happens. *Ib.* 125.

16. An escheat grant is *prima facie* evidence of title; but being a presumption of right, it only exists until the contrary is proved. *Ib.* 126.

See Grant 29, 30, 31, 37, 38.

ESCROW.

See Non Est Factum.

ESTATE TAIL.

1. A, by his will devised as follows: "I give and devise to my son R L all that land called" &c. "to him and his heirs for ever, together with the lands thereto adjoining; and in case he dies without heirs, to my son J L and the heirs of his body lawfully begotten." This devise created an estate tail in R L, the devisee. *Laidler v Young's Lessee.* 69

2. Under the act of *Nov.* 1792, *ch.* 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate. A common deed of bargain and sale operates to convey the estate, and vest a fee simple in the grantee. *Ib.*

3. —— If a limited interest is conveyed by a tenant in tail, upon the expiration of the particular interest, the tenant in tail again takes the estate tail as originally held. *Ib.*

4. A lease for seven years, made by a tenant in tail, will have the effect to pass the estate for the term therein expressed. *Ib.*

5. A mortgage made by a tenant in tail defeats the estate tail for a limited time. If the money is paid, the old estate is revived. *Ib.*

6. An estate tail cannot be devised under the act of Nov. 1782, *ch* 23, *Ib.*

7. The following words in the *Habendum* of a deed of conveyance of lands in trust, after vesting a life estate in R P, "and from and after her decease, that T P, and *his heirs forever*, shall have and possess the said lands and premises; and in case of his, the said T P's *death without lawful issue*, the said lands shall revert to and be vested in the said R P, and her heirs, for ever," were held to create an estate tail in T P, with a reversion in fee to R P. *Hollingsworth & ux. v M'Donald et al.* 330

8. The court of chancery cannot decree that a deed of conveyance, executed by a tenant in tail, may be recorded after the expiration of the time limited by law for the recording of deeds—an estate tail not being within the provisions of the act of 1785, *ch.* 72, *s.* 11. *Jones et al v Jones,* 281

9. T T by his will, dated in 1795, devised his lands to be equally divided between his two nephews W C and W S, to them and their heirs, for ever, and in case W C died without lawful issue, then he devised one half of the lands to his nephew G S, to him and his heirs for ever. *Held*, as to a moiety of the lands devised to W C, that on his death without lawful issue the estate tail became extinct, and the limitation over to G S took effect, and one moiety of the lands vested in him in fee simple. *Smith et al. v Smith et al.* 314

10. The act of 1786, *ch.* 45, to direct descents, as to estates tail general, and for transmitting the tenancy intail to the issue of the tenant, is altered or changed only by making the land descendible to all the children of the tenant intail, and their respective issue indefinitely. *Ib.*

11. R H by his will devised to his son C H the free use of his land called, &c. *during his natural life*, and after the death of his son, he devised the land unto the heirs of his son C H, lawfully begotten of his body, for ever, and for the want of such heirs, then over, &c. *Held* by the county court, that C H took an estate intail general in the land so devised to him. *Keys & Heron v Goldsborough's Lessee,* 371

See Acts of Assembly 6.
—— Conveyance 1, 2.
—— Devise 4.
—— Proprietary 1, 5, 6.

ESTATE VESTED.

See Vested Estate.

ESTOPPELL.

See Acts 1, 2.
—— Assumpsit 1.
—— Cause of Action 1.
—— Escheat 10.
—— Grant 9, 31.
—— Location of Lands 9, 13.
—— Practice 2.
—— Vendor & Vendee.

EVIDENCE.

1. On the plea of *no assets* or *plene administravit*, the *onus probandi* lies on the plaintiff. *Morgan v Slade et ux.* 38

Wilson v Slade et ux. 281

2. If an executor or administrator neglects to return an inventory is he bound for all debts and legacies? *Quere.* *Ib.*

3. An executor cannot give in evidence that he had equally and proportionably, or nearly so, distributed the residue of the personal estate of his testator, after payment of debts, among the legatees. *Morgan v Slade et ux.* 38

4. Where an act of assembly directs that an auctioneer shall give bond before he obtains a license, if the fact was that the license was obtained prior to the execution of the bond, it is capable of proof. *M'Mechen v The Mayor, &c.* 41

5. Parol evidence admitted to prove that the land granted to the husband of the demandant is the same land of which dower is demanded. *Keefer v Young,* 53

6. Parol evidence admitted to prove, that a debt secured by a mortgage was continental money, altho' expressed to be a specie debt. *Worthington v Bicknell,* 58

7. Where there is a mortgage with a covenant by the mortgagor that he will pay the money, and he assigns his equity of redemption, is he a competent witness for the assignee to prove that the money loaned was continental money? *Ib.*

8. Unless the contrary is proved, it is presumptive evidence that a clerk who is dead and who made certain entries on the books of his employer, delivered the goods as charged. *Clarke v Mugruder et al.* 77

9. A memorandum made by a clerk in the record of a deed stating that the date of the deed had been altered, &c. is not evidence, being an act done without authority, and will not invalidate the deed. *Owings v Norwood's Lessee,* 96

10. Ancient deeds of lease and release not required to be enrolled may be read in evidence. *Ib.* 106

11. If the testimony of a witness is intended to be objected to because of his holding adjoining land, his interest must be located on the plots. *Hall v Gittings Jr's. Lessee,* 120

12. The declarations of a former holder of adjoining lands as to the bounds of the land in dispute, admitted in evidence, it not appearing by the plots in the cause that he was interested. *Ib.* 121

13. The jury were directed, on certain evidence of title and descent, that land which had been granted as escheat land was not escheatable, altho' the land had not been claimed under the original grantee for upwards of 100 years. *Ib.* 122

14. Possession is presumptive evidence of right, and a defendant in ejectment cannot be deprived of his possession by any person but the rightful owner of the land—that is, he who hath the *jus possessionis*. *Ib.*

15. An escheat grant is *prima facie* evidence of title; but being a presumption of right, it only exists until the contrary is proved. *Ib.*

16. A deed located on the plots in the cause, and not counterlocated by the opposite party, may be read in evidence by the party locating it, to show how it is located; but when its validity comes in question, if it is a defective deed, it is to have no effect. *Hammond et al. Lessee v Norris,* 130

17. The clerk of a court has no authority by law to certify *a fact* under the seal of the court. His duty is to grant exemplifications. *Ib.* 131

18. Parol evidence is not admissible to prove that a tract of land, mentioned in a certificate of survey, never was actually surveyed under the warrant which issued for that purpose. *Ib.* 132

19. Parol evidence as to the law, practice, and usages of the land office, respecting the proprietary instructions, different kinds of warrants and their effects, certificates of surveys and resurveys, caveats and grants, and decisions of the judges of the land office, admitted in evidence in an action of ejectment, with the consent of the parties. *Ib.* 132

20. The rules of the land office cannot be proved by witnesses. They are to be found on the records of the office, and in the proclamations of the proprietary. *Hammond et al. Lessee v Warfield,* 151

21. Opinions as to the rules of the land office cannot be received as evidence. *Ib.*

22. The usage and practice of the land office must be proved by the adjudi-

cations of the judges of that office; and not by the opinions of witnesses as to what that usage and practice may be. *Ib.*

23. To entitle the party not seized of the original tract of land to the relation of his grant to the certificate of resurvey for the vacant land included therein, he must prove that his certificate was returned to and in the land office at the time the junior survey was made. *Hammond et al. v Norris*, 132

24. A deed for a certain number of acres of land, (being part of a tract,) without metes or bounds, but referring to another deed (not produced,) to ascertain the same, is not legal evidence to show title, or to support the location of the same on the plots in the cause, without producing the deed to which it refers. *Ib.* 142

25. Where certain facts and circumstances were not admissible in evidence to prove that a deed recited in another deed had been executed. *Ib.* 147.

26. The time when a certificate of survey was returned to the land-office is a matter of fact determinable by the jury. *Hammond et al. Lessee v Warfield*, 159.

27. Certain facts and circumstances not permitted to be given in evidence to prove at what time a certificate of survey was returned to the land office. *Ib.*

28. The actings and doings of a person under whom the party does not claim in an action of ejectment, not permitted to be given in evidence. *Ib.*

29. Parol evidence not admitted to prove that a deed of manumission under the act of 1752, ch 1, s 5, was attested in the presence of two witnesses. *Negro James v Gaither*, 176.

30. Whether or not the counsel of the plaintiff is bound to answer whether or not he has in possession certain letters written by the defendant to the plaintiff relative to the subject in dispute. *Ib.*

31. As to what is legal evidence of a sale made at auction—The entries made by a clerk to the auctioneers are not the best evidence. *Ib.*

32. Parol evidence admitted to prove the manner in which wills are made and proved in *France*. *De Sobry v Terrier*, 191

33. A copy of a will, executed in *Philadelphia*, and transmitted by the testator to *Martinique*, certified by a notary public of that island, and returned under a commission issued to take testimony, is sufficiently authenticated by having the certificate of the chief colonial officer, that it is the signature of the notary; and which, with the testimony of the testamentary executor, returned under the commission, is sufficiently proved, and may be read in evidence. *Ib.*

34. Proof of the *French* laws in testamentary affairs, &c. returned under a commission to take testimony, and admitted in evidence. *Ib.*

35. The mere showing the seal of a court of our own state in another court of the state, is a sufficient authentication of the judgment of the court it purports to certify. *Ib.* 208.

36. The seal of the court of a foreign country does not prove itself; but it must be proved by testimony. *Ib.*

37. Parol evidence admitted to prove the seal of the court of a foreign country. *Ib.*

38. Where a question comes incidentally or collaterally before the court, whether or not the same strictness in the admission of evidence is to be observed as if the question was directly in issue? *Ib.* 219

39. The laws of a foreign country are to be proved by evidence, and the court are to decide what is proper evidence of such laws, and to construe them, and judge of their applicability to the question before the court *Ib.*

40. The letters of a witness permitted to be read in evidence to impeach the credit of the witness as to what he had sworn upon his examination taken under a commission, contradictory to the contents of the letters, but not to prove any other fact. *Ib.* 220

41. If a contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed. *Ib.*

42. If the plaintiff in an action of *assumpsit* files an account in court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that in which he has elected by his account to consider the defendant his debtor. *Ib.* 222.

43. In an action of debt upon a guardian's bond dated in 1797, the plaintiff proved by a witness, that land of the plaintiff was, during his minority, rent-

ed by the defendant, to the witness, in 1791, and that the rent was afterwards lessened, in consequence of an agreement between them that the witness should take charge of the defendant's stock upon the land. *Held*, that such evidence was inadmissible. *Gunby v Selby.* 244.

44. A copy of a paper purporting to be an additional inventory to the inventory of the estate of the deceased, certified under the hand and seal of the register of wills to be a true copy taken from the original additional inventory offered, (not proved,) by the administrator, and lodged in the office of the register, was held to be incompetent evidence to charge the administrator with the amount of the goods and chattels therein mentioned. *Emory's Adm'r. D. B. N. v Thompson's Ex'x.* 244

45. An original paper purporting to be an "additional inventory to the inventory of the deceased, offered by the administrator," proved to be in the hand writing of a person who acted as a clerk for the administrator, and endorsed "additional inventory," in the hand writing of the administrator, found among the papers in the office of the register of wills, wrapped up in the original inventory of the estate of the deceased, was held to be competent evidence to charge the administrator with the several sums of money specified in the said paper, as part of the goods and chattels of the deceased. *Ib.*

46. In an action of ejectment brought by the lessee of the *Vestry of a Parish*, the plaintiff offered to read in evidence certain entries in a book, purporting to be, and proved by a witness, who was formerly register of the vestry, to be handed down to him as the vestry book of the parish—*Held*, that the testimony was improper, and ought not to be read in evidence. *Martin and Smith v Gunby et al. Lessee,* 248

47. A private plot of the lands in dispute permitted, under certain circumstances, to be read in evidence. *Howard v Moale et al. Lessee,* 268

48. A deposition taken on the survey, of a witness, who was absent out of the state at the time of the trial, was permitted to be read in evidence, due diligence having been used to procure the attendance of the witness. *Ib.* 272

49. Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person, under whom he claimed, died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—the strongest presumption of a good title being in favour of the defendant. *Davis's Lessee v Davis's heirs,* 295

50. Evidence taken in a former suit in chancery between the same parties for the same relief, and which suit was dismissed by the complainant, may be read in evidence by the defendants on the hearing of the new suit. *Hopkins v Stump et al.* 301

51. In *assumpsit* for work and labour, the act of limitations was pleaded—*Held*, that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person, who was then up the bay should come to town he would have the business settled, was sufficient to bar the act of limitations. *Poe v Conway's Ad'r.* 307

52. A receipt given by the plaintiff's attorney for a sum of money stated to be in full of a judgment, is not conclusive evidence that the judgment is satisfied so far as to prevent the plaintiff from taking out an execution for any balance which may be actually due thereon. *Hughes v O'Donnell,* 324

53. In an action of trespass *q. c. f.* the plaintiff offered to prove that he was in possession of the land on which, &c. and that the defendant committed the trespass complained of on the land so in the possession of the plaintiff, at the place by him located on the plots in the cause—*Held*, that such evidence was admissible. *Hogmire, et al. v M'Coy,* 351

54. —— The plaintiff proved by a witness, that he was present when the land on which, &c. was originally located or taken up, and that the tract was then located, as it now is on the plots in the cause—*Held*, that the evidence was admissible. *Ib.*

55. Where the declaration in an action of replevin stated the taking of the goods to be in *Gay-street*, from the dwelling house of the plaintiff—*Held*, that evidence of the defendant's having taken the goods in *Gay-street*, was sufficient, without proving that he took them from the dwelling house of the plaintiff. *Faget v Brayton,* 350

56. A record book of *Charles* county court, containing the certificate and affidavit of a priest in 1702, that he had in 168⁴, in *Saint Mary's* county, married a negro man named L R, to a white woman named E S, both servants of W R—an affidavit of a person who was present at the marriage, proving the same, as also the issue by that marriage, and an entry from a parish register of the latter county, stating that the above were therein recorded in 1702, and the whole recorded in the above record book in 1703—The entry thereof in the record book, (there being proof of the loss of the originals and of the parish register,) was offered in evidence in a petition for freedom, by a person claiming as a descendant from E S, to prove the existence of a free white woman named E S in the family of W R, her marriage, and the issue by that marriage—*Held*, that the entry on the record book was competent and admissible evidence. *Shorter v Boswell*, 360

57. A P by his will, devised to C C and A M, all his real estate, to be sold by them for the payment of his debts. Evidence of a sale made at auction by them to W G, of a part of the estate, together with a memorandum of the sale subscribed by the auctioneer, and a receipt given by them for the purchase money—*Held* to be admissible and competent to show a title at law in W G, without a deed of bargain and sale, or other conveyance to him from the trustees, and to be sufficient to enable his lessee to recover such real estate in an action of ejectment. *Keys & Horn v Goldsborough's Lessee*, 369

58. The not returning an inventory on the estate of the deceased by his administrator, is not sufficient evidence to charge the administrator with a debt of the intestate. *Leeke's adm. v Beanes*, 373

59. To establish an account in bar claiming a discount in the name of F B, the principal in a bond given to a trustee for the sale of a real estate, and on which action was brought against his surety, the defendant offered to read a copy under seal of a *decree* of the court of chancery, for the sale of the estate of J E, and the appointment of the plaintiff trustee to make the sale, and the trustee's report of the sale, and ratification by the chancellor, together with the auditor's statement and ratification thereof, showing the proportion due to the creditors, and among others, of the sum due to F B above named, and claimed to be set off—*Held*, that such evidence was inadmissible. *Gantt v Bowie's Adm'r.* 375

60. —— In the same action, the plaintiff to show that F B was not entitled to the proportion adjudged to him out of the proceeds of the real estate of J E, and to prove that F B was one of the sureties in the administration of the personal estate of J E, and that it had been misapplied, and not legally administered, offered in evidence the administration bond, and an account signed by F B, for the administratrix—*Held*, that the evidence was not admissible. *Ib.* 376

61. If the possession of land has gone agreeably to an ancient deed which needed no enrolment, the *inspeximus* of the deed may be read in evidence, and is effectual to pass the land. *Hall v Gittings's Lessee*, 380

62. Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence if the whole tract is united in the same person, and the whole has been located. *Ib.* 382

63. A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her, having been declared to be defective, was admitted to give evidence on the part of the defendant in an action of ejectment brought for the same land by a person claiming under her deed. *Ib.* 386, *(note)*

64. The declarations of a deceased person, then seized of a particular tract of land not located on the plots in the cause, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant—*Held*, that the declarations were not admissible in evidence. *Ib.* 393

65. Where a person acted in the character of a justice of the peace, altho' he did not so style himself, yet it is *prima facie* evidence that he had authority to act as such. *Bryden v Taylor*, 396

66. What is alleged as a motive or inducement in the deposition made by a witness, may be read in evidence. *Ib.* 398

67. The minutes of the proceedings of a notary public of a foreign country are to be considered as records under the curtesy of nations; and a copy, under the hand and notarial seal of a notary, is sufficient evidence of the protest of a foreign bill of exchange. *Ib.* 399

68. Where a person was frequently seen in the counting house of the plaintiff transacting business as a principal, and was generally supposed, believed and understood, in the town, to be a partner in the house of the plaintiff, —*Held*, not sufficient evidence to prove that such person was a partner of the house of the plaintiff. *Ib.* 400

69. The admissions by counsel of certain facts stated in a special verdict, taken at a former trial between the same parties in the same action, are not evidence upon a new trial between them. *Dorsey v Gassaway*, 402

70. If slaves remain in the possession of the vendor, the bill of sale must be recorded; and whether they remained in his possession, is a matter of fact for the jury; and if the jury find they were not in his possession, then the bill of sale is not required to be recorded, and it is not evidence, although it has been recorded, unless the execution of it is proved. *Ib.* 403

71. To lay the foundation for proving an original deed lost, the evidence must be given to the court. *Ib.* 404, *(note)*

72. Proof being made of the loss of an original deed of mortgage of land and slaves, dated in 1763, the *inspexinus* was admitted to be read as legal evidence, although the deed was not recorded in the manner prescribed by law so far as respected the slaves in dispute. *Ib.* 407

73. Where a deed is lost, or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the deed. *Ib.*

74. Certain facts refused to be admitted in evidence to prove that a person who purchased certain slaves, and had made a voluntary gift of them, never paid any consideration for the slaves. *Ib.* 408

75. Certain acts and declarations of the defendant, subsequent to his sale of the slave for which the action of replevin is brought, before his insolvency, are not evidence to defeat the claim of the plaintiff. *Ib.*

76. An affidavit made by a debtor, and payment into the treasury under the tender law, admitted in evidence to prove the person was indebted and made the payment into the treasury. *Ib.*

77. Proceedings in chancery under an insolvent law, are not evidence in favour of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of that law. *Ib.*

78. A bill in chancery, with all the proceedings and the decree thereon, cannot be read in evidence in a case between different parties from those named in the proceedings. *Ib.* 409

79. An answer in chancery made by the respondents therein, from information derived from the defendant in this cause, is not admissible in evidence; but the declarations of the defendant are admissible evidence, and a witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant. *Ib.* 410

80. Declarations made by the defendant before and after his discharge under an insolvent law, may be given in evidence against him. *Ib.* 412

81. A surveyor's original book of surveys, and his parol testimony admitted by the general court, in an action of ejectment, as competent evidence to prove that a certificate of survey, returned to the land office, was forged. See COURT OF CHANCERY, 42, 43, 44, and
Boreing's Lessee v Singery, 455

82. The proprietary instructions of the 30th of June 1769, requiring a survey of reserved lands to be made, &c. read in evidence. *Ib.*

83. The general court refused to direct the jury that it was not competent in a court of law to give evidence to the jury, or to go into any parol examination of the surveyor or his books to vacate a grant, or to prove that the certificate of survey returned to the land office, as a foundation for the grant, was forged or fraudulent, and not made out by him or his authority. *Ib.* 458

84. Depositions returned under a commission issued to *Pennsylvania* to take testimony in the cause, was not permitted by the general court to be read in evidence, it not appearing by the return of the commissioners that they had given any notice, or that proper notice had been given. *Ib.* 459

85. Depositions similarly taken were not permitted to be read in evidence, al-

though offered in evidence by the opposite party; concurred in by the court of appeals. *Ib.* 460

86. Where a court of law admitted evidence to prove that a certificate of survey was forged, such evidence could not have been deemed admissible, only on the ground, that if the certificate was proved to be forged, the grant obtained on it was fraudulent, and could not have any operation in law to pass the land to the grantee therein. *Singery v The Attorney-General,* 457

87. Where the fact of the forgery of a certificate of survey, under the grant on which the defendant claimed, came before the court and jury collaterally, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy, the verdict in favour of the defendant cannot be received as evidence to prove that the certificate was not forged. *Ib.*

88. There being no designation of part of a tract of land contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner: and the bond is void for uncertainty, except on the principle of election. *Hault & Parks v Gist, et al.* 498

See Answer in Chancery 2, 3, 4.
—— Bill of Exceptions 2.
—— Court of Chancery 17, 25.
—— Covenant 1, 3, 4.
—— Ejectment 38.
—— Grant 31, 32.
—— Hearsay Evidence.
—— Location of Lands 9, 10, 16.
—— Plene Administravit 1.
—— Presumption.
—— Testimony.
—— Trespass 5.

EXCEPTIONS.

See Answer in Chancery 3.

EXECUTION.

1. A receipt given by the plaintiff's attorney for a sum of money, stated to be in full of a judgment, is not conclusive evidence that the judgment is satisfied, so far as to prevent the plaintiff from taking out execution for any balance that may be actually due thereon. *Hughes v O'Donnell,* 524

2. A judgment having been obtained by B against E, and C his surety, a *fieri facias* issued thereon against E, who survived C, and was laid on E's lands. The administrator of C paid the amount of the judgment to B, who directed the judgment to be entered for the use of the administrator of C. *A venditioni exponas,* issued for the use of the administrator of C, for a sale of the lands, was returned unsold, &c. and was, on motion of the defendant, *quashed. Berry v Nicholls,* 508

See Assignment 1.
—— Deed 1.
—— Fieri Facias.
—— Parol Evidence 6.

EXECUTOR DE SON TORT.

1. On the death of a defendant in an action of debt, &c. a summons may issue to an executor *de son tort,* (there being no legal executor or administrator of the deceased,) to appear to and defend the action. *Norfolk v Gault,* 435

2. An executor *de son tort,* being summoned, appeared to an action of debt, brought against the deceased, and confessed the action, and admitted the debt was due to the plaintiff. An auditor was then appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c. according to the act of 1793, *ch.* 101, *sub ch.* 8, *s.* 9. This appointment of auditor was afterwards stricken out by the county court, and a judgment was rendered on the confession above mentioned for the debt and costs, *de bonis testatoris, si non de bonis propriis as to costs.* Error being brought, the judgment was *reversed* by the court of appeals. *Ib.*

EXECUTOR PRO FORMA.

See Executors & Administrators 3, 4.

EXECUTORS & ADMINISTRATORS.

1. If an executor or administrator neglects to return an inventory is he bound for all debts and legacies? *Quære. Morgan v Slade, et ux.* 38
Watson v Slade, et ux. 281

2. An executor cannot give in evidence that he had equally and proportionably, or nearly so, distributed the residue of the personal estate of his testator after payment of debts, among the several legatees. *Morgan v Slade et ux.* 38

3. Any creditor may sue an executor

pro forma, provided he shows himself to be a creditor under the laws of the country where the contract was made, and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled. *De Sobry v Terrier*, 224

4. An executor *pro forma* is accountable to the testamentary executor, only for the surplus remaining after payment of debts. *Ib.*
5. Whatever fund in this state is answerable for debts, is answerable to all creditors alike, according to the laws of the state. *Ib.*
6. If the laws of this state give a preference to its citizens in the payment of the debts of a deceased, the defendant, if sued by a foreign creditor, must plead such preference. *Ib.*
7. The not returning an inventory on the estate of the deceased by his administrator, is not sufficient evidence to charge the administrator with the debt of the intestate. *Locke's Adm'r. v Beanes*, 373
8. Where the executor, &c. had confessed the action, and admitted the debt was due to the plaintiff, and an auditor was appointed to ascertain the sum for which judgment should be rendered, regard being had to the assets, &c. according to the act of 1798, *ch.* 101, *sub ch.* 8, *s.* 9, which appointment was afterwards stricken out by the court, and a judgment rendered on the confession above mentioned, for the debt and costs *de bonis testatoris, si non de bonis propriis* as to costs, such judgment was held to be erroneous, and was reversed. *Norfolk v Gantt*, 435
9. An administrator must comply with the order of the orphans court directing a sale of the personal estate of the deceased for the payment of debts, and he cannot retain the property at the appraised value, on paying the debts out of his own funds to the amount of the appraisement. *Hall v Griffith*, 483
10. After payment of the debts of the deceased, and all legal costs and charges attending the administration, the administrator must deliver over the residue of the personal estate specifically to the representatives of the deceased. *Ib.*
11. Where an administrator retained a part of the personal estate of the deceased, at the appraised value, and sold a part for the benefit of the estate, and a part as his own property—*Held*, that he must account for the increase of the slaves, and for the use, labour and hire, of all slaves retained or hired by him; and where one of the slaves had runaway, he must account for such slave at the appraised value, unless he used all reasonable endeavours to regain possession of the slave. He is to be allowed for money expended in clothing and maintaining such slaves, as were unable to work, and in bringing up, clothing, &c. the increase of slaves, so long as they continued a charge. Also for all debts paid; for his commission, and all legal costs. He is to be charged with the amount of the inventory; with the sum gained on the sales of the property, and with the debts received. *Ib.*
12. A complainant is not entitled to relief in equity against the executors of a joint obligor, who was a surety in the bond. Per *Hanson*, Chan. *Williams v Hodgson*, 474, *(note)*

See Attachment 2.
—— Evidence 44, 45.
—— Executor De Son Tort.
—— Pleading 1, 3, 4.
—— Plene Administravit 1.

EXECUTORY DEVISE.

1. Where the limitation over is in fee after an indefinite failure of issue, it is not good as an executory devise, because of its tendency to create a perpetuity by rendering property unalienable. *Drury & Bennett v Negro Grace*, 556
2. Z W, by his will devised as follows: "I devise and bequeath the whole of my property, real and personal, to my beloved daughter M W, to her and her heirs for ever; *and in case she dies without lawful issue*, then the whole of my said property is to be possessed by my dear wife A, *during her widowhood, and no longer*, and at her death or marriage to be sold at public sale, and the money arising therefrom to be equally divided between H, C and N." M W obtained possession of the property so devised to her, and died in the 17th year of her age, unmarried, and without having any issue, having by her will manumitted all her slaves. A, the widow of the testa-

tor, is now living, having in the lifetime of M W married R B. Negro *Grace*, one of the slaves manumitted by M W, petitioned for her freedom against H, C and N – *Held*, that the limitation over in the will to A, during her widowhood, constituted a good executory devise, because it was to take effect on the contingency of M W dying without leaving issue at the time of her death; and that the petitioner is not entitled to her freedom. *Ib*

See Devise 7.

EXEMPLIFICATION.

See Authentication 1, 2.
—— Evidence 17, 33.
—— Office Copy 1.
—— Official Acts 1.
—— Record 1.

EXPLANATION.

See Covenant 1.

EXTINGUISHMENT.

1. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Williams v Hodgson*, 474

See Bequest 1.
—— Court of Chancery 5.
—— Covenant 1.
—— Devise 1.
—— French Laws 4, 5.
—— Ignorance 1.

F.

FACTOR.

See Discount 3.

FATHER & CHILD.

See Parol Agreement 1.

FEE SIMPLE.

See Devise 4, 5.
—— Estate Tail 2, 9.

FEE TAIL.

See Estate Tail.

FELONY.

1. *Felony* and *misdemeanor* may be joined in the same indictment. *Burke v The State*, 426

FEME COVERT.

1. Where conveyances, defectively acknowledged by *femes covert* grantors, were held not to pass the estate in the lands to the grantees. *Greene v Muse, et al. Lessee*, 62
Hollingsworth, et ux. v M'Donald, et al. 230
2. A *feme covert* cannot transfer or pass her interest in land to another unless by fine, common recovery or deed, executed and acknowledged according to the mode prescribed by the act of 1715, *ch.* 47. *Hollingsworth, et ux. v M'Donald, et al.* 230
3. A literal adherence to the form of the certificate of the acknowledgment of a deed by a *feme covert*, is not essentially requisite; and the omission of words deemed essential can be supplied by the substitution of words equipollent, or of similar import and signification. *Ib.*

See Witness 3.

FIERI FACIAS.

1. A *writ of error*, after seizure under a *fieri facias* and before a sale, is no *supersedeas*. *Beatty's Adm'r. v Chapline*, 7
2. Whether or not the return made on a *fieri facias* by a sheriff, stating that he had laid it "on four acres of land near *Baltimore*-town, and adjoining the lands of *G L*," also on "about 47 acres of land more or less, part of *C H* or *T R*, and part of *M N*, lying to the N side of *Pitt*-street near *Baltimore* town," &c. and the sheriff's return on a *venditioni exponas*, issued for a sale of the lands, that he had "made and satisfied plaintiff in part," together with parol evidence of the sale of the lands by the sheriff, and his deed therefor to the purchaser, are sufficient to vest the legal title to the lands in the purchaser? *M'Elderty v Smith's Lessee*, 72
3. If the defendant, during the pendency of a *scire facias*, on a judgment against him, aliens his lands, the plaintiff after a *fiat* on the *scire facias*, may issue a *fieri facias*, and levy it on the lands so aliened, without proceeding against the alienees. *Ib.*
4. If A has purchased land from B, and paid for it, without receiving a conveyance, or if B holds in trust for A, in either case A has an interest liable to be taken and sold on a *fieri facias*, and the purchaser is entitled to the aid of the court of chancery to obtain the legal title. Per *Hanson*, Chan.
Hopkins v Stump, et al. 305

5. But if A has only contracted and given his bond for the purchase money of a tract of land, and received in return a bond of conveyance—Has A such an equitable interest as is liable to be sold on a *fieri facias*, so as to place the purchaser in the room of A? *Ibid.* *Ib.*
6. Whether or not land is bound by a judgment, so far, as that if A has a judgment against him, and before execution, A *bona fide* sells his right to B, that C, the plaintiff, may on *fieri facias* take and sell it without inquiring or seeking for other property? *Ibid.* *Ib.*
7. A judgment having been obtained by B against E, and C his surety, a *fieri facias* issued thereon against E, who survived C, and was laid on E's land. The administrator of C paid the amount of the judgment to B, who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C, for a sale of the land, was returned unsold, &c. and was, on motion of the defendant, *quashed*. *Berry v Nicholls*, 508
See Attachment 1.
—— Insolvent Debtor 1.

FINE.
See Feme Covert 2.

FOREIGNERS.
1. If a contract is made in this state between foreigners, and the debtor dies in a foreign country, the creditor may recover in the courts of this state according to the laws of the state. *De Sobry v Terrier*, 228

FOREIGN COURTS.
See Authentication 2.
—— Seal 2, 3.

FOREIGN LAWS.
1. Parol evidence admitted to prove the manner in which wills are made and proved in *France*. *De Sobry Ex'r. of Terrier v Terrier*, 191
2. Proof of the *French* laws in testamentary affairs, &c. returned under a commission to take testimony, and admitted in evidence. *Ib.* 198
3. The laws of a foreign country are to be proved by evidence, and the court are to decide what is proper evidence of such laws, and to construe them, and judge of their applicability to the question before the court. *Ib.* 219, 229
4. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled. *Ib.* 224
See Contract 2, 3, 4, 5, 6, 7, 8.
—— Distribution 2.
—— French Laws.

FORGED BANK NOTE.
See Assumpsit 3.

FORGERY.
1. A surveyor's original book of surveys, and his parol testimony, admitted by the general court, in an action of ejectment, as competent and admissible evidence to prove that a certificate of survey returned to the land office, was forged. *Boreing's Lessee v Singery*, 455
See Court of Chancery 42, 43, 44.
—— Evidence 86, 87.

FORMULA.
See Acknowledgment of Deeds 1, 2, 5.
—— Feme Covert 1, 3.

FRAUD.
1. Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. *Brogden v Walker's Ex'r. &c.* 292
2. Fraud may be inquired into in a court of law. See FORGERY, 1. PAROL EVIDENCE 9, and *Boreing's Lessee v Singery*, 455
3. Where a bill was filed in chancery to set aside and annul a decree heretofore obtained by the defendant against the complainant, on the ground of fraud practised by the defendant in obtaining that decree, there appearing to be no evidence of fraud, the bill was dismissed. *Hoffman v Baker*, 486
4. Where a court of law admitted evidence to prove that a certificate of survey was forged, such evidence could not have been deemed admissible, only on the ground, that if the certificate was proved to be forged, the grant obtained on it was fraudulent, and could not have any operation in law to pass the land to the

grantee therein. *Singery v The Attorney-General*, 487
5. Fraud may be inquired into as well at law as in equity, and where frauds are clearly established, the courts of law and a court of chancery have concurrent jurisdiction. *Ib.*
6. On a bill in chancery for vacating a certificate of survey and grant of the land, on the ground of a fraud committed by a forgery of the certificate —*Held*, that the court of chancery had jurisdiction, although the question of forgery of the same certificate had, in an action of ejectment between the same parties, come collaterally before a court of law and jury, and the court admitted evidence to establish the forgery, and the jury gave their verdict in favour of the defendant, who claimed under the certificate alleged to be forged. *Ib.*
7. Although on a bill in chancery charging forgery, the defendant cannot be compelled to answer any fact which will criminate himself, yet that court has jurisdiction over the case; and on proof of the forgery, by which a fraud has been committed, will grant relief by vacating the grant, &c. from whence the injury has arisen, or will make such decree as the circumstances of the case render necessary. *Ib.*

See Court of Chancery 7, 20, 24, 34, 40, 44.

FREEDOM.

1. A parol sale of a slave for seven years, and then to be set free and manumitted by the vendee, who, on the expiration of the seven years, executed a deed of manumission—*Held*, that it was sufficient to grant freedom to the slave. *Negro Cato v Howard*, 323
2. Where a slave was sold in this state by an administrator of a deceased, to a person resident therein, but who afterwards removed to *Virginia* and took the slave with him—*Held*, that the slave was not entitled to his freedom. *Negro George v Dennis*, 454

See Evidence 56.
—— Hearsay Evidence 2, 3.
—— Manumission 1, 2.

FRENCH LAWS.

1. If an heir pure and simple, heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate or succession of a person dying in *France*, so as to prevent his recovery as such under the *French* laws, he can recover in the courts of this state on a contract made in *France*. *De Sobry v Terrier*, 224
2. Whether or not his having intermeddled would defeat his right of recovery? *Ib.*
3. Unless the jury are satisfied, according to the laws of *France*, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, then such co-heir is entitled to recover as a creditor whatever the jury may find due on a contract made in *France*, according to the laws of *France*. *Ib.* 228
4. No part of the personal estate of a testator dying in *France*, is subject to distribution among his co-heirs, but the surplus or residuum, remaining after the payment of all his debts and legacies; and a debt due to one of the co-heirs is as much entitled to payment as a debt due to a stranger, unless there is proof that there is a law of *France* which extinguishes the right or claim of the co-heir creditor with benefit of inventory, if he does not renounce as co-heir. *Ib.*
5. The laws of *France* are matters of fact to be found by the jury, upon evidence to be produced to them; and unless they find some law of *France* which extinguishes the claim or right of recovery of the plaintiff, (being co-heir and creditor,) he has a right to recover. *Ib.*
6. Where the court directed the jury that it did not appear to the court that there was any law of *France* which was a legal impediment to the plaintiff's recovery. *Ib.*

See Foreign Laws.

G.

GARNISHEE.

See Attachment 3.

GENERAL DESCRIPTION.

See Description 2, 3.

GENERAL REPUTATION.

See Hearsay Evidence 2, 3.

GENUINE.

See Forged Bank Note.

GRANT.

1. Parol evidence admitted to prove that the land granted to the husband of a demandant is the same land of

which dower is demanded. *Kerfer v Young*, 53

2. If the heirs of J S, in whom the title to a tract of land was, were living in *Great Britain* at the passage of the act of confiscation, then an escheat warrant issued to E N for the said land, issued without authority of law. But that a grant which issued for the land surveyed under such warrant, came within the provisions of the 8th *sect.* of the act of *Nov.* 1781, *ch.* 20. *Owings v Norwood's Lessee*, 96

3. —— Such grant is valid to pass the land to E N, notwithstanding he had paid no more than two thirds of the appraised value of the land. *Ib.*

4. Lands liable to confiscation may be granted by the state under an escheat warrant. *Ib.*

5. —— Such escheat grant will operate by relation so as to give title from the date of the warrant of escheat. *Ib.*

6. —— The 8th *section* of the act of *Nov.* 1781, *ch.* 20, secured the land so escheated to the party on his paying two thirds of the value. *Ib.*

7. Where the court would not direct the jury that the plaintiff's escheat grant did not pass the land, the defendant claiming the same under a defective title. *Ib.*

8. If land liable to escheat is included in a certificate of survey and grant, under an escheat warrant on another tract of land, such grant will operate to convey a good title to the land so included, if there has been possession, and payment of quit rents, for more than twenty years, &c. *Hall v Gittings Jrs. Lessee*, 115

9. Land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards became escheat, will not pass under such grant, and the state is not estopped from granting it to any other person. *Ib.*

10. An escheat grant relates to the original grant. *Hall v Gittings Jrs. Lessee*, 115
Howard v Moale et al. Lessee, 260, 263

11. If there are two descriptions of land granted, the one by name and the other by metes and bounds, the grant will operate to pass the land according to that description which is most beneficial to the grantee. *Hall v Gittings Jrs. Lessee*, 117

12. An escheat grant operates to pass the whole of the original tract escheated. *Hall v Gittings Jrs. Lessee*, 117
Howard v Moale et al. Lessee, 263

13. The jury were directed on certain evidence of title and descent, that land which had been granted as escheat land was not liable to be escheated. *Hall v Gittings Jrs. Lessee*, 122

14. An escheat grant is *prima facie* evidence of title; but being a presumption of right, it only exists until the contrary is proved. *Ib.*

15. Where a certificate of resurvey was liable to be vacated upon a caveat, and the vacant land included therein might be and was granted to another person, whether or not a grant for the land in the first mentioned certificate will not pass the land? *Hammond et al. Lessee v Norris*, 130
Hammond et al. Lessee v Warfield, 151

16. To entitle the party, not seized of the original tract resurveyed, to the relation of his grant to the certificate of resurvey for the vacant land included therein, he must prove that his certificate was returned to and in the land office at the time the junior survey was made. *Hammond, et al. Lessee v Norris*, 132

17. If a person, not seized of the original tract, takes out a warrant to resurvey such tract, he acquires a title in the vacant land included in such resurvey, when the composition money is paid, unless some other person in the mean time becomes interested in such vacant land. *Ib.*

18. Where the grant will relate to the certificate of resurvey so as to overreach a mesne grant for the same land. *Hammond, et al. Lessee v Norris*, 132
Hammond, et al. Lessee v Warfield, 152, 155

19. A grant for vacant land, not contiguous to the original tract included in a certificate under a warrant of resurvey, will operate to pass such vacant land, unless some other person in the mean time becomes interested in such vacancy. *Ib.*

20. Where the relation of a grant to the certificate of survey depends upon the time when the caution money was paid. *Ib.*

21. —— Where it depends upon the time when the certificate was returned to the land office. *Ib.*

22. To entitle the party to the benefit of the relation of his grant to the certificate of survey, it is incumbent on

him to show an equity, and the producing copies under seal of the warrant, certificate of survey and grant, is not sufficient to entitle him to such benefit. *Hammond, et al. Lessee v Warfield*, 159

23. A grant of land is to be construed most favourably for the grantee. *Tolson's Lessee v Lanham*, 174

24. A grant for land cannot be corrected or controled by the certificate of survey, but will pass the land comprehended within the courses and distances expressed in the grant. *Ib.*

25. If a grant is for more land than is contained in the certificate of survey, it may be vacated in the court of chancery; but if it is for less land, the grantee's remedy, if any, must be in equity. *Ib.*

26. The Proprietary held the dominion of *Maryland*, and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary legal and equitable rights as in the hands of any other person; and on an equitable interest being obtained agreeably to the rules of the land-office, by any person taking out a warrant, returning a certificate of survey, and paying the composition money, the party became entitled to a grant, which he could compel from the Proprietary. *Howard v Moale et al. Lessee*, 249, 259

27. The reversionary interest of the Proprietary, reserved in lands granted by him, might be destroyed by deed made by the tenant in tail under the act of *June* 1773, *ch.* 1, as effectually as the reversionary right of any individual. *Ib.*

28. A subsequent grant, covering land in which the Proprietary had a reversionary interest, will operate to pass such reversionary interest. *Ib.*

29. An escheat certificate and grant do, by operation of law, relate to the original tract, and is strictly within the principle and rule of law of relation between grants and certificates. *Ib.* 263

30. Where the first and second courses of an original tract of land called *D F*, are described as "beginning at a bounded locust tree, being the N E bounded tree of *D P's* land, [called *U C*,] and running by the land of the said *P*, E 65 ps. to a bounded oak, then N E 150 ps. to a bounded red oak of the said *P's* land;" and the first and second courses of an escheat grant of the same land called *D F*, is described as "beginning at a locust, now bounded at or very near to the place where stood a bounded locust, the original beginning tree of *D F*, and a bounded tree of a tract of land called *U C*, formerly laid out for D P, and running thence with the laid land, E 65 ps. (it being expressed in the certificate of the original survey to run by the land of the said *P*, E 65 ps. to a bounded oak, which cannot be found,) thence N E 238 ps. still bounding on the said land, to the N W branch of *Patapsco* river, (it being therein expressed to run N E 150 ps. to a bounded red oak of the said *P's* land, and the certificate of the said *P's* land mentioning to run that course to a bounded red oak standing by the side of the said N W branch, which oak is not known,")—*Held*, that there was no doubt or ambiguity, and that if the beginning of *D F* is rightly located on the plots at the termination of the twelfth line of *U C*, and there is no evidence of the existence of any tree as called for at the termination of the first line of *D F*, then the expressions in the escheat grant do bind that grant to the true location of the original tract called *D F*, as to the two first lines thereof, so far as the second line of the original did actually extend; and that the first and second lines of the original tract do, by virtue of the expressions therein used, bind those lines on the thirteenth and fourteenth lines of *U C*. *Ib.* 264

31. Where the plaintiff has not located his escheat grant on the plots co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant; but he is estopped by that location from going beyond the letter *F*, located on the plots, from whence he must run to the head of *Howard's* branch at whatever point the same may be, agreeably to his location of his pretensions, and the location by which the defendant has taken defence. *Ib.* 266

32. The plaintiff cannot give any evidence of the lines of his escheat grant running otherwise than he has located them on the plots as his pretensions, but he is not precluded from giving evidence of any other lines, as the lines of the original tract, by way of

illustration; and he may support the location of his pretensions so far as he can show that they are located within the limits of the original tract. *Ib.*

33. From the place where the second line of a grant of land terminated, the third line thereof, viz. "Then N N W 86 p. to a bounded red oak," must run the number of perches expressed in the grant, and cannot in its length be increased or diminished, unless proof is made of the tree called for, or the place where it stood. *Ib.* 267

34. —— So the fourth line, viz. "Then S W to the head of *Howard's* branch," must run a straight line to the head of *Howard's* branch. *Ib.*

35. The course and distance expressed in a grant of land, must always be controled by a call expressed therein as the termination of the course; and the following course and distance used in a grant, viz. "N E 50 ps. to a small branch which maketh the outward narrows of the said land," must be complied with as nearly as they can to strike the branch described, as it existed at the time of the survey, subject to the variation of the compass on that line. *Ib.* 269

36. Where the court refused to direct the jury that the second line in a grant of land, viz. "Then N E 150 ps. to a bounded red oak of the said *P's* land," (being the fourteenth line of that land, which tree being lost, the place where it stood could not be proved,) must terminate at the end of 150 ps. from the beginning thereof, it being a matter of fact to be left to the determination of the jury." *Ib.* 270

37. The court refused to direct the jury that an escheat grant did not pass any land included in the original grant, except the same was included within the metes and bounds of the escheat grant as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same. *Ib.* 271

38. A grant of land surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such granted to a third person. *Quere.* *Ib.* 261, *(note.)*

39. Where the expressions used in a grant of land described it as "lying on the ridge of Gunpowder river, beginning at a bounded oak being the westernmost bounds of a tract of land laid out for M. S. and running W 560 ps. to a bounded oak *standing by the great falls*, and running N from the said oak," &c. *Held*, that they do not operate to bind the first line to terminate at the great falls, altho' no evidence is given of the tree or place where it stood. *Hall v Gittings's Lessee*, 392

40. As to a variance between a description of land contracted to be sold and conveyed, and that mentioned in a grant of the land, see COURT OF CHANCERY, 33 and *Hammond v Sappington*, 446

41. A certificate of survey was returned to the land office for a tract of land called *B J*, surveyed on the 19th of April 1794, for A J. On the 8th of May 1797, A J obtained a warrant of resurvey on *W C*, and in his resurvey made on the 1st of May 1798, he included *B J*, and called the land *B S*. On the 10th of May 1798, A J obtained a proclamation warrant on his own certificate of the land called *B S*, and had it executed on the 29th of April 1799. But D W had, on the 26th of February 1798, obtained a proclamation warrant on *B J*, and had it executed on the 22d of May 1798, and called the land *B C*. A J paid the composition money on *B S* on the 8th of May 1799, and D W paid the composition money on *B C* on the 9th of May 1799. Both certificates were caveated by the opposite party; and the Judge of the land office ordered a grant to issue to A J for the land called *B S*. To vacate which grant a bill was filed in the court of chancery in the name of the attorney general at the relation of D W. *Decreed*, that the bill be dismissed. *The Attorney General v Jarrett*, 472

See Fraud 2, 4, 6, 7.
——Parol Evidence 9.
——Proprietary 1.
——Reversion.
——Trespass 4. 5.

GUARANTY.

1. The defendant in a letter of credit to the plaintiffs in favour of H and G, used the following expressions: "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house."—*Held*, that the guaranty was an absolute one, and to continue un-

til countermanded by the defendant. *Grant v. Ridsdale, et al.* 186.
See Declaration 1.

GUARDIAN.
See Evidence 49.
—— Natural Guardian.

H.

HANDWRITING.
See Evidence 45.

HEARSAY EVIDENCE.
1. The declarations of a former holder of the adjoining lands, as to the bounds of the land in dispute in an action of ejectment, admitted in evidence, it not appearing by the plots, that he was interested in establishing the facts related by him. *Hall v Giltings Jun. Lessee.* 121.
2. In a petition for freedom, the following part of the deposition of a witness was held to be competent evidence: "and always understood she, [the ancestor of the petitioner,] came from R N, but did not know it of his own knowledge, and heard that she went by the name of *Patt Shorter.*" As also this part of the deposition of another witness: "That his mother, in her life-time, told him it was generally reported, and she always understood, that a woman named *Patt Shorter* came to the family of J L from the family of R N." *Shorter v Boswell,* 359, 360
3. The declarations of a deceased person, then seized of a particular tract of land, not located on the plots, were offered in evidence by the defendant in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant—*Held,* that the declarations were not admissible in evidence. *Hall v Gittings's Lessee,* 393

HEIR.
1. Where an estate is vested by an act of assembly in the *female heirs* of a person it being on a contingency, which never happened, the daughters then living will take. *Beall et al. Lessee v Harwood,* 167
See. Adversary Possession 4.
—— Entry 1.
—— French Laws.

HYPOTHETICAL OPINION.
See Bill of Exceptions 2.

I. J.

IDENTIFICATION.
See Description 5.

IDEOT.
See Court of Chancery 20.

IGNORANCE OF THE LAW.
1. Ignorance of the law, as to consequences resulting from a creditor having accepted the bond of one of the partners for a simple contract debt due from the partnership, cannot excuse or form a ground for relief in equity. *Williams v Hodgson,* 474
See Court of Chancery 34.

ILLUSTRATION.
See Location of Lands 10.

IMBECILITY.
See Court of Chancery 35.

IMPLIED WARRANTY.
See Warranty.

IMPROVED VALUE.
See Court of Chancery 34.

INADEQUACY OF PRICE.
See Court of Chancery 20, 34, 35.

INCLOSURE.
See Ejectment 2, 3, 4.
—— Limitation of Actions 2, 7, 8.

INCOMPETENT WITNESS.
See Witness 1, 5.

INCREASED VALUE.
See Court of Chancery 34.

INDEPENDENT COVENANT.
See Covenant 3, 4, 8.

INDICTMENT.
1. An indictment containing two counts, one charging *felony,* and the other a *misdemeanor,* was held to be good. *Burk v The State,* 426
2. As to the joinder of offences in criminal cases, and the joinder of causes of action in civil cases. *Ib.*
3. After the prisoner has pleaded generally to an indictment having two counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the other. *Ib.*
See Criminal Prosecution 1.

INDORSEMENT.
See Blank Indorsement.

INDUCEMENT.

1. What is alleged as a motive or inducement, in the deposition made by a witness, may be read in evidence. *Bryden v Taylor*. 393

INJUNCTION.

1. Whenever, on motion to dissolve an injunction, it appears from the answer that the complainant was entitled to an injunction at the time of obtaining it, the same shall continue until final hearing or further order, unless the defendant admits every thing alleged in the bill, on account of which the injunction was obtained. When that admission is made, and the injunction has been to stay execution at law, the injunction may be dissolved, with a proviso that not more be levied than remains due after allowing every thing claimed by the complainant. But when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is invariably continued until final hearing or further order. *Lynch v Colegate*, 34

See Court of Chancery 15.

INNUENDO.

See Slander 4, 5, 6.

INSOLVENT DEBTOR.

1. Property, acquired by an insolvent debtor after he has been legally discharged under the insolvent law of *March* 1774, *ch.* 28, otherwise than "*by descent, gift, devise, bequest, or in a course of distribution*," is not liable for or subject to debts contracted prior to his discharge; and if such property is liable, it cannot be affected by a *fieri facias*, without a *scire facias* having previously issued, if a year and a day have elapsed. *Pollitt v Parsons*, 61
2. No person can set up his discharge under an insolvent law to disaffirm his prior acts. See Acts, 1, 2, and *Dorsey v Gassaway*, 411

See Declarations 1, 3.
—— Evidence 77.
—— Reference 1.

INSPEXIMUS.

1. If the possession of land has gone agreeably to an ancient deed, which needed no enrolment, the *Inspeximus* of the deed may be read in evidence, and is effectual to pass the land. *Hall v Giffings's Lessee*, 389
2. Proof being made of the loss of an original deed of mortgage of land and slaves, dated in 1763, the *Inspeximus* was admitted to be read as legal evidence, altho' the deed was not recorded in the manner prescribed by law so far as respected the slaves in dispute *Dorsey v Gassaway*, 403

See Evidence 56.

INSTRUCTIONS.

1. The proprietary instructions requiring a survey of his reserved lands to be made, &c. read in evidence. *Boreing's Lessee v Singery*. 456

INTEMPERANCE.

See Court of Chancery 20.

INTENDMENT.

See Court of Appeals 1.
——Judgment 1.

INTENTION.

See Acts of Assembly 4, 5.
——Will 4.

INTERESTED WITNESS.

See Witness 1.

INTERROGATORIES.

See Answer in Chancery 3.
—— Commission and Commissioners 1.
——Notice 1.

INTESTATE'S ESTATE.

1. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled. *De Sobry v Terrier*. 224
2. Personal property adheres to the person; and wherever the intestate is domicil at the time of his death, the property is to be distributed according to the laws of that country. *Ib.*

INTOXICATION.

See Drunkenness.

INVENTORY.

See Evidence 45, 46, 58.
—— Executors & Administrators, 1, 7.
—— Plene Administravit 1.

JOINDER OF ACTIONS.

1. When causes of action may be join-

ed in the same action. *Burk v The State*, 426

JOINDER OF OFFENCES.

1. As to the joinder of offences in criminal cases, and the joinder of causes of actions in civil cases. *Burk v The State.* 486.
2. An indictment containing two counts, one charging *felony*, and the other *misdemeanor* was held to be good. *Ib.*

JOINT TENANTS.

1. Where an estate is vested by an act of assembly in two persons, their heirs and assigns, is it an estate in joint tenancy or tenancy in common? *Beall, et al. Lessee v Harwood*, 167

See Acts of Assembly 6

JOINT OBLIGORS.

See Court of Chancery 46.
—— Executors & Administrators 12.
—— Surety 3.

IRRELEVANT.

See Slander 2.

ISSUE.

See Evidence 56.
—— Heir 1.

ISSUES

1. Can the defendant by his rejoinder put in issue two separate and distinct facts to a replication assigning breaches for the nonperformance of the condition of a testamentary bond? *Quere. Morgan v Steele, et ux.* 38

See Plene Administravit 1
—— Slander 2.

JUDGES & JUSTICES.

See Bill of Exceptions 1.

JUDGMENT.

1. The appellate court cannot travel out of the record, but will make every necessary intendment in support of the judgment of the inferior court. *M'Mahon v The Mayor, &c.* 41
2. A judgment by confession is an admission of the right of the nominal plaintiff to recover the penalty of a bond having a collateral condition, and whether the judgment is in the right of the plaintiff, or for the use of another, is not material, and cannot be a cause of reversing it. *Ib.*
3. —— Such a judgment admits the plaintiff's claim against the defendant to the extent of the penalty of the bond upon which the action is brought, although the defendant had pleaded general performance, and without a replication on the part of the plaintiff assigning breaches, withdrew the plea and confessed judgment. *Ib.*
4. A judgment obtained by a third person against the vendor of land *bona fide* made for a valuable consideration, *mesne* the making the contract and the payment of the money, cannot defeat the equitable interest acquired by the vendee, nor is it a lien on the land to affect the right of such *cestui que trust*. *Hampson v Edelen*, 64
5. A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment. But the legal estate in the land is not vested in the judgment creditor, although he can convert it into money to satisfy his debt by pursuing the proper means. *Ib.*
6. If the defendant, during the pendency of a *scire facias* on a judgment against him, aliens his lands, the plaintiff, after a *fiat* on the *scire facias*, may issue a *fieri facias*, and levy it on the lands so aliened, without proceeding against the alienees. *M'Elderry v Smith's Lessee*, 72
7. Where the judgment of a court below, after a general verdict in *assumpsit*, was reversed, because of a defective count in the declaration. *Grant v Ridsdale, et al.* 186
8. Whether or not land is bound by a judgment, so far, as that if A has a judgment against him, and before execution, A *bona fide* sells his right to B, that C, the plaintiff, may, on *fieri facias*, take and sell it without inquiring or seeking for other property? *Hopkins v Stump, et al.* 306
9. A receipt given by the plaintiff's attorney for a sum of money, stated to be in full of a judgment, is not conclusive evidence that the judgment is satisfied, so far as to prevent the plaintiff from taking out execution for any balance that may be actually due thereon. *Hughes v O'Donnell*, 324
10. A judgment having been obtained by B against E, and C his surety, a *fi. fa.* issued thereon against E, who survived C, and was laid on E's lands. The administrator of C paid the amount of the judgment to B, who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C, for a sale of the lands, was returned unsold, and was on motion of the de-

fendant *quashed*. *Berry v Nicholls*, 508

See Attachment 1.
—— Court of Chancery 15, 17, 24.
—— Covenant 8.
—— Dower 3, 4.
—— Executor De Son Tort 2.
—— Executors & Administrators 8.
—— Insolvent Debtor 1.

JURA REGALIA.

See Proprietary 2, 3, 5.

JURISDICTION.

1. Fraud may be inquired into as well at law as in equity; and where frauds are clearly established, the courts of law and a court of chancery have concurrent jurisdiction. *Singery v The Attorney General*, 487

See Court of Chancery 5, 33, 42, 43.

JURY.

1. Whether or not a will was legally executed is a matter of fact for the jury. *Hall v Gittings Jrs. Lessee*, 121
2. The jury are to find when the composition money was paid on surveys of land.
Hammond et al. Lessee v Norris, 130
Hammond et al. Lessee v Warfield, 151
3. The time when a certificate of survey was returned to the land office is a matter of fact determinable by the jury. *Hammond et al. Lessee v Warfield*, 159

See Criminal Prosecution 4, 5, 6.
—— Location of Lands 11.
—— Presumption.
—— Variation.
—— Verdict 1, 2, 3.

JUSTICES OF THE PEACE.

1. Where a person acted in the character of a justice of the peace, although he did not style himself as such, yet it is *prima facie* evidence that he had authority to act as such. *Bryden v Taylor*, 396

L.

LACHES & LENGTH OF TIME.

See Limitation of Actions.
—— Specific Performance 1.

LAND.

See Judgment 4, 5, 6, 8.

LAND OFFICE.

1. Parol evidence admitted, *with the consent of the parties*, to prove the law, practice, and usage of the land office. *Hammond, et al. Lessee v Norris*, 132
2. Parol evidence is not admissible to prove the rules, usages and practices, of the land office. *Hammond, et al. Lessee v Warfield*, 151
3. The courts of justice will take notice of the rules of the land office as forming regulations relative to property, and will direct the jury as to the law arising from such rules. *Ib.*
4. The rules of the land office cannot be proved by witnesses; they are to be found on the records of the office, and in the proclamations of the Proprietary. *Ib.*
5. Opinions as to the rules of the land office cannot be received as evidence. *Ib.*
6. The usage and practice of the land office must be proved by the adjudications of the judges of that office, and not by the opinions of witnesses as to what that usage and practice may be. *Ib.*
7. —— The adjudications contain the legal information as to what have been the usage and practice in the land office. *Ib.*
8. To entitle the party, not seized of the original tract, to the relation of his grant to the certificate of resurvey for the vacant land included therein, he must prove that his certificate was returned to, and in the land office, at the time the junior survey was made. *Hammond, et al. Lessee v Norris*, 130
9. Where the relation of the grant to the certificate of survey depends upon the time when the certificate was returned to the land office. *Hammond, et al. Lessee v Warfield*, 151
10. The time when a certificate of survey was returned to the land office is a matter of fact determinable by the jury. *Ib.* 159
11. Certain facts and circumstances not admissible in evidence to prove at what time a certificate of survey was returned to the land office. *Ib.*

See Grant 41.

LAPSE OF TIME.

See Court of Chancery 34.
—— Limitation of Actions.
—— Presumption 4.
—— Specific Performance 1.

LEASE.

See Estate Tail 4.
—— Evidence 10.

LEASE & RELEASE.

See Evidence 10.

LEGACY & LEGATEE.
See Bequest 1.
—— Executors & Administrators 1, 2.

LETTER OF ATTORNEY.
See Corporation 1.

LETTER OF CREDIT.
See Guaranty 1.

LEX LOCI.
See Contract
—— Distribution.
—— Foreign Laws 4.
—— Intestates Estate 1, 2.
—— Personal Estate 1.

LIABILITY.
See Surety 1.

LICENSE.
See Trespass 6.

LIEN.
See Court of Chancery 24.
—— Equitable Estate 2.
—— Fieri Facias 4, 5, 6.
—— Judgment 4, 5, 6, 8.
—— Overseer 1.
—— Preference 1.

LIFE ESTATE.
See Estate for Life.

LIMITATION OF ACTIONS.
1. Specific performance of a bond executed in 1764, for conveying a tract of land, decreed by the court of chancery in favour of the heir at law of the obligee, on bill filed in 1792. *Haffner's devisees v Dickson's Heir*, 46
2. Where the plaintiff with title, having possession by enclosure and cultivation of a part of a tract of land, claiming the whole, and the defendant without title, having possession by enclosure of a part of the same tract, with the use, (by cutting timber &c.) of the other parts not enclosed, the plaintiff is bound by the act of limitations as to that part of the land which is in the possession of the defendant by actual enclosure for more than twenty years next preceding the bringing the ejectment, but not as to the parts used by the defendant exterior to the enclosure. *Chaney v Ringgold et al. Lessee*, 87
3. The act of limitations did not attach or run against the Lord Proprietary on any possession of vacant lands. *Ib.*
4. No adversary possession of land can avail against the state. *Hall v Gittings Jrs Lessee*, 112
5. An adversary possession commencing against the Lord Proprietary, ceased to operate against the state after the act of confiscation. *Ib.*
6. Nothing but twenty years adverse possession can defeat a title acquired under a grant. *Ib.* 122
7. A person out of possession for more than twenty years, where there is not an adversary possession in virtue of some right or by actual enclosures, his heir, or person claiming under him, may bring an ejectment without an actual entry into the land. *Hammond, et al. Lessee v Warfield*, 156
8. A naked possession, (possession without right,) is only adversary to the extent of actual enclosures. *Ib.*
9. In *assumpsit* for work and labour, the act of limitations was pleaded—*Held*, that evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town, he would have the business settled, was sufficient to defeat the operation of the act of limitations. *Poe v Conway's admr.* 367
10. Where the defendant was in possession of, and holding a slave for the space of three years antecedent to the institution of an action of replevin against him for the slave—*Held*, that the act of limitations was a bar to the plaintiff's recovery, notwithstanding the property in the slave had been in the plaintiff, and the slave was loaned by him for an indefinite time to J S, who during that loan sold the slave to the defendant; and although the suit was brought within three years from the time the plaintiff knew of such sale. *Hatrie v Sanders*, 327
11. Where the defendant in an action of ejectment was in possession of 100 acres of land, by enclosures and cultivation, for 15 years, and then enlarged his enclosures, so as to include 150 acres, and he possessed the same, so enlarged, by enclosures for 6 years thereafter, claiming the same as his own—*Held*, that he had title to the 100 acres by adversary possession. *Hall v Gittings's Lessee*, 391

See Ejectment 3, 4, 5, 38.
—— Possession 5.

LIMITATION OF ESTATE.
See Executory Devise 1, 2.

LOCATION OF LANDS.
1. If the testimony of a witness is intended to be objected to because of

his holding adjoining land, &c. his interest must be located on the plots. *Hall v Gittings Jr's. Lessee*, 120

2. The declarations of a former holder of adjoining lands, as to the bounds of the land in dispute, in an action of ejectment, admitted in evidence, it not appearing by the plots that he was interested in establishing the facts related by him. *Ib.* 121

3. A deed located on the plots, and not counterlocated by the opposite party, may be read in evidence by the party locating it, to show how it is located; but when its validity comes in question, if it is bad, it is to have no effect. *Hammond et al. Lessee v Norris*, 130

4. A deed for a certain number of acres, part of a tract of land, without metes or bounds, but referring to another deed, (not produced,) to ascertain the same, is not legal evidence to show title, or to support the location thereof on the plots, without producing the deed to which it refers. *Ib.* 142

5. Where there is but one location of the beginning of a tract of land on the plots, and that is counterlocated, the jury cannot, by reversing lines, &c. ascertain a different beginning for the plaintiff than that located by him. *Ib.* 148

6. The plaintiff in ejectment must make such locations on the plots of the land claimed, as will suit his case. *Ib.*

7. The jury cannot find a location of their own, but if they find for the plaintiff they must find some one of the plaintiff's locations on the plots. *Ib.*

8. Where the first and second courses of an original grant of a tract of land called *D F*, are described as "beginning at a bounded locust tree, being the N E bounded tree of *P D's* land, [called *U C*,] and running by the land of the said *P*, E 65 ps. to a bounded oak, then N E 150 ps. to a bounded red oak on the said *P's* land;" and the first and second courses of an escheat grant of the same land called *D F*, are professed to be run in the same manner—*Held*, that there is no doubt or ambiguity, and that if the beginning of *D F* is rightly located on the plots at the termination of the 12th line of *U C*, and there is no evidence of the existence of any tree as called for at the termination of the first line of *D F*, then the expressions in the escheat grant bind that grant to the true location of the original tract called *D F*, as to the first lines thereof, so far as the second line of the original did actually extend; and that the first and second lines of the original tract do, by virtue of the expressions therein used, bind those lines on the 13th and 14th lines of *U C*. See GRANT, 30, and *Howard v Moale, et al. Lessee*, 263

9. Where the plaintiff has not located his escheat grant on the plots co-extensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant; but he is estopped by that location from going beyond the letter V, located on the plots, from whence he must run to the head of *Howard's* branch, at whatever point the same may be, agreeably to his location of his pretensions, and the location by which the defendant has taken defence. *Ib.* 266

10. The plaintiff cannot give any evidence of the lines of his escheat grant running otherwise than he has located them on the plots as his pretensions; but he is not precluded from giving evidence of any other lines as the lines of the original tract, by way of illustration; and he may support the location of his pretensions, so far as he can show that they are located within the limits of the original tract. *Ib.* 267

11. The court directed the jury, that they might find the true location of *D F*, for which the ejectment was brought, by a greater or less variation of the compass, as might appear to them proper from the evidence, provided that by such allowance of variation, they did not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from the letter V to the head of *Howard's* branch. *Ib.* 274

12. The court directed the jury, that the plaintiff could not recover any land which should be found to lie without a straight line to be drawn from the letter V to the head of *Howard's* branch, (he having located that line of his grant in that manner,) altho' those lands should lie within the lines of the tract of land for which the ejectment was brought, and also within the lines of the plaintiff's pretensions as located on the plots. *Ib.* 275

13. The court refused to direct the jury, that if the plaintiff is estopped from showing the true location of the land, for which the ejectment is brought, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff. *Ib.*

14. Where a deed for part of a tract of land has not been particularly located on the plots, it may be read in evidence if the whole tract of land is united in the same person, and the whole has been located. *Hall v Giltings's Lessee*, 383

15. The declarations of a deceased person, then seized of a particular tract of land, not located on the plots, were offered in evidence by the defendant, in an action of ejectment, to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant—*Held*, that the declarations were not admissible in evidence. *Ib.* 393

16. In trespass *q. c. f.* the defendant took defence for, and located on the plots, a tract of land called *G C*, which included a tract called *T N*, on which the trespass was alleged to have been committed, and which last tract the plaintiff located on the plots; and he also located lot No. 3351, but he did not counterlocate the location made by the defendant. The defendant read in evidence the grant of *G C*, which called to begin at the end of the second line of lot No. 3351. *Held*, that it was not necessary for him to produce the grant of lot No. 3351, to prove the location of that lot, and the beginning of *G C*. *Tomlinson v Rizer*, 444

17. If the beginning of a tract of land is lost, or cannot be proved, then it is to be found by reversing the lines from the first known and established boundary. *Hammond et al. Lessee v Norris*, 149

See Evidence 54, 64.
—— Grant 33, 34, 35, 36, 37, 39.
—— Variation.
—— Verdict 1, 2, 3, 4, 5.

LORD PROPRIETARY.

See Proprietary.

LOST DEED.

See Evidence 71, 73.

M.

MANUMISSION.

1. Parol evidence not admitted to prove that a deed of manumission was attested in the presence of two witnesses, only one having signed the same. *Negro James v Gautier*, 176

2. A deed of manumission under the act of 1752, *ch.* 1, *s.* 5, executed in the presence of only one witness, will not operate to give freedom to the slaves therein mentioned. *Ib.*

3. A parol sale of a slave for seven years, and then to be set free and manumitted by the vendee, who, on the expiration of the seven years, executed a deed of manumission—*Held*, that it was sufficient to grant freedom to the slave. *Negro Cato v Howard*, 323

MARKET OVERT.

1. The purchasing a horse at a public market, established by law for the sale of horses, &c. does not entitle the purchaser to hold the horse against the claim of the true owner. *Browning v Magill*, 308

2. There is no *market-overt* in this state. *Ib.*

MARRIAGE.

See Evidence 56.

MEMORANDUMS.

See Evidence 9.

METES AND BOUNDS.

See Grant 37.

MISDEMEANOR.

1. *Felony* and *misdemeanor* may be joined in the same indictment. *Burk v The State*, 426

MISTAKE.

See Court of Chancery 46.

MITIGATION OF DAMAGES.

See Covenant 1.

MIXED POSSESSION.

See Ejectment 2, 3, 4.
—— Possession 1.

MORTGAGE.

1. Parol evidence admitted to prove that a debt secured by mortgage was con-

tinental money, although expressed to be a specie debt. *Worthington v Bicknell*, 58

2. If there is a mortgage, with a personal covenant by the mortgagor that he will pay the money, and he assigns his equity of redemption, is he a competent witness for the assignee to prove that the money loaned was continental money? *Quere*. *Ib.*

3. The assignee of a mortgage is entitled to the same relief which the mortgagor would have been entitled to against the mortgagee. *Ib.*

4. Where certain facts would not warrant the presuming a mortgage made in 1706 was satisfied before 1780, the mortgagee being a *British* subject, and although he was never in possession of the mortgaged premises—the party not showing any title under the mortgagor. *Owings v Norwood's Lessee*, 96

5. Where lands were mortgaged to a *British* subject, on failure of payment of the mortgaged money, a complete legal estate vested in the mortgagee, liable to confiscation, and was vested in the state under the acts of confiscation, subject to the right of redemption. The *British* treaty cannot operate on such a case. *Ib.*

6. A deed, purporting to be absolute, for the conveyance of land and personal property, was held, as intended, to secure a debt, and the party permitted to redeem, &c. See COURT OF CHANCERY 20, and *Brogden v Walker's Ex'r. &c.* 285

7. A mortgage of lands to a *British* subject before the revolution, was not thereafter defeated by the act of confiscation, but it was protected by the *British* treaty, and *decreed* to be sold to pay the mortgage debt. *Howard v Moale et al. Lessee.* 258, 259, *(notes.)*

8. If a mortgage of slaves was subsisting, and the mortgagor, claiming the absolute ownership of them, sold them for a full consideration, although as to the mortgagee the sale would transfer only the equitable interest in the slaves, yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee; & notwithstanding the after discharge of the vendor under an insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts in perfecting his title to the slaves, will enure in law to confirm, and not to defeat his contract with the vendee. *Dorsey v Gassaway*, 411

See Application of Payments 1, 2.
—— Court of Chancery 3, 20.
—— Ejectment 25.
—— Estate Tail 5.

MUTUAL COVENANTS.

See Covenant 3, 4.

N.

NATURAL GUARDIAN.

1. Where a mother, as the *natural guardian* of her infant children, who were under the age of 14 years, hired a slave, belonging to them, to a sea captain, to perform a voyage, on wages, the slave to be returned, &c. and the vessel being sold by her owners at the port to which she sailed, the slave was put by the captain on board of another vessel bound home, and furnished with provisions for the voyage, but never returned home. In an action of *trover* by the children, prosecuting by their *prochain amy*, against the captain, for the value of the slave —*Held*, that the action was well brought. *Hay et al v Conner*, 347

NO ASSETS.

See Pleading 1, 3, 4, 5.

NOMINAL PLAINTIFF.

See Judgment 2.

NON EST FACTUM.

1. A executed a bond to B, and delivered it to C, to be delivered to B—*Held*, not to be the act and deed of A, it not having been received by B. *Owings v Norwood's Lessee*, 108 *(note)*

NON RESIDENT.

See Acknowledgment of Deeds 3, 4.

NOTARY PUBLIC.

1. The minutes of the proceedings of a notary public of a foreign country, are to be considered as records, under the curtesy of nations; and a copy, under the hand and notarial seal of a notary, is sufficient evidence of the protest of a foreign bill of exchange. *Brydon v Taylor*, 399

See Authentication 1.

NOTICE.

1. In executing a commission issued to a foreign country for the purpose of taking testimony, notice is not neces-

sary, but time should be given that the opposite party might file cross interrogatories. *Owings v Norwood's Lessee*, 98

2. A warrant of resurvey taken out by a person not seized of the original tract, is not legal notice of the location of the warrant. *Hammond et al. Lessee v Norris*, 150
Hammond et al. Lessee v Warfield, 151

3. Where vacant land, not contiguous to the original tract resurveyed, is included in a certificate of resurvey, it is not legal notice of the location of the warrant, until the certificate is returned to the land-office. *Hammond et al. Lessee v Warfield*, 151

4. It not appearing by the return of the commissioners to a commission issued to *Pennsylvania*, to take testimony, that they had given any notice, or that proper notice had been given, the testimony taken thereunder was not permitted to be read in evidence. Nor was it evidence, altho' offered by the opposite party. *Bowing's Lessee v Singerly*, 459, 460

See Court of Chancery 45.
—— Designation 1.
—— Equitable Estate 1.
—— Warranty.

O.

OFFICE COPY.

See Evidence 45.

OFFICE FOUND.

1. Lands escheated to the state vests without *office found* or an actual entry. *Hall v Gittings Jr's. Lessee*, 112

See Confiscation 2, 4, 5, 6.

OFFICIAL ACTS.

1. The clerk of a court has no authority by law to *certify a fact* under seal. His duty is to grant exemplifications. *Hammond, et al. Lessee v Norris*, 151

See Evidence 9, 17.

ONUS PROBANDI.

See Court of Chancery 46.
—— Pleading 3.
—— Plene Administravit 1.

OPERATION OF DEEDS.

See Grant 8, 11, 12, 15, 24.

ORDINANCE.

See Repeal 1.

ORIGINAL.

See Evidence 66, 72, 75.

ORPHANS COURT.

See Executors & Administrators.

OVERSEER.

1. An overseer cannot retain a part of the crop made on a plantation as his share, under an agreement with his employer that he is to have one sixth part of the crop made, &c. See Trover 2, and
Weems v Stallings, 365

OYER & TERMINER, &c.

See Court of Oyer & Terminer, &c.

P.

PARISH REGISTER.

See Evidence 46, 56.

PAROL AGREEMENT.

1. A parol contract between a father-in law and son-in-law, that the former would give a real estate to his grandson, in consideration of the son-in-law paying one half of the value of the land—Not enforced, though possession was held by the son-in law, and part of the purchase money paid. *Wingate v Dail*, 76

2. W D becoming an insolvent debtor, his real estate was sold by his trustee, and purchased by C D, to whom a deed was executed. C D, in making the purchase, acted professedly as a friend to W D, so far that if he could procure the purchase money within a certain time, he was to have the benefit of the purchase; but as he could not raise the money, it became necessary to sell a part of the premises to reimburse C D—which part W D, and M his wife, were desirous to preserve to themselves, and were anxious to procure a friend to become the purchaser for and on behalf of M the wife, and as a trustee for her. Which intention was, previous to the sale, made known to R W, who approved, and it was agreed that J S, (who consented,) should be the nominal purchaser, and R W was to become his surety for the payment of the purchase money. J S became the purchaser, and it was known and understood at the time, that he purchased for M, the wife of W D. In the bond for the purchase money R W became surety for J S, and possession of the premises had always been in W D, who procuring a part of the purchase money, applied to R W to obtain a bond of conveyance from C D to M the wife, for the property, when be

was informed by R W that he had got a bond to himself, as J S had given it all up to him, and that W D had nothing to do with it. J S had been induced, in order to secure R W, to direct C D to give a bond of conveyance to R W, who assured J S that no advantage should be taken of W D, and that when he paid the purchase money, a deed should be executed to his wife M. The premises were conveyed by C D to R W, who brought an ejectment against W D. The amount of principal and interest of the purchase money was tendered by W D to R W, and a deed demanded, which he refused. W D, and M his wife, filed their bill against R W, to be quieted in their possession of the premises, and to compel a conveyance from him to M the wife—*Decreed*, that R W convey the land in question to W D, and M his wife, in fee simple, and that an account be stated, &c. and the balance due be paid at the time R W shall convey the land. *Davis et ux. v Walsh*, 329

See Contract 3.
—— Covenant 1.
—— Warranty.

PAROL EVIDENCE.

1. Parol evidence admitted to prove that the land granted to the husband of the demandant, is the same land of which dower is demanded. *Keefer v Young*, 53
2. Parol evidence admitted to prove, that a debt secured by a mortgage was continental money, although expressed to be a specie debt. *Worthington v Bicknell*, 58
3. Parol evidence is not admissible to prove that a tract of land, mentioned in a certificate of survey, never was actually surveyed by the surveyor, &c. *Hammond et al. Lessee v Norris*, 132
4. Parol evidence admitted, *with the consent of the parties*, to prove the law, usage and practice, of the land office. *Ib.*
5. Parol evidence is not admissible to prove the rules, usages and practices, of the land office. *Hammond et al. Lessee v Warfield*, 161
6. Parol evidence not admitted to prove that a deed of manumission was attested in the presence of two witnesses. *Negro James v Gaither*, 176
7. Parol evidence admitted to prove the manner in which wills are made and proved in *France*. *De Sobry v Terrier*, 191
8. A surveyor's original books, and his parol testimony, admitted by the general court as competent and admissible evidence, to prove that a certificate of survey returned to the land office was forged. *Boreing's Lessee v Singery*, 455
9. The court refused to direct the jury that it was not competent in a court of law to give evidence to the jury, or to go into any parol examination of the surveyor or his books, to vacate a grant, or to prove that the certificate of survey returned to the land office as a foundation for the grant, was forged or fraudulent; and not made out by him, or his authority. *Ib.* 458
10. There being no designation of part of a tract of land contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner; and the bond is void for uncertainty, except on the principle of election. *Huntt & Parks v Gist et al.* 498

See Covenant 1.
—— Fieri Facias 2.

PARTIES & PRIVIES.

See Ejectment 24.
—— Evidence 28, 78.

PARTNERS AND PARTNERSHIP.

1. Where a person was frequently seen in the counting-house of the plaintiff, transacting business as a principal, and was generally supposed, believed and understood, in the town, to be a partner in the plaintiff's house, it is not sufficient evidence to prove that such person was a partner of the house of the plaintiff. *Bryden v Taylor*, 400
2. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Williams v Hodgson*, 474
3. Ignorance of the law, as to the consequences resulting from a creditor having accepted the bond of one of the partners for a simple contract debt due from the partnership, cannot excuse or form a ground for relief in equity. *Ib.*
4. —— Such a bond, altho' not binding on the partner who did not exe-

cute it, is obligatory on the partner who did execute it, *Ib.*
See Overseer 1.

PATENT.
See Grant.

PAYMENT.
See Application of Payments 1, 2.

PEDIGREE.
See Evidence 56.

PERFORMANCE.
See Contract.
——Covenant 3, 4.
——Specific Performance.

PERPETUITY.
See Executory Devise 1.

PERSONAL ESTATE.
1. Personal property adheres to the person: and wherever the testator is domicil at the time of his death, the property is to be distributed according to the laws of that country. *De Sobry v Terrier,* 224

PLAINTIFF.
See Cestui Que Use 1.
——Judgment 2.

PLEADING.
1. Whether or not a rejoinder of *no assets* is a departure from the plea of performance in an action on a testamentary bond? *Quere. Morgan v Slade et ux.* 38
2. Can the defendant by his rejoinder put in issue two separate and distinct facts to a replication assigning breaches for the non-performance of the condition of a testamentary bond? *Quere. Ib.*
3. On the plea of *no assets* or *plene administravit*, the *onus probandi* lies on the part of the plaintiff. *Morgan, v Slade, et ux.* 38
Wilson v Slade, et ux. 281
4. Is the plea of *no assets* the same in effect as the plea of *plene administravit? Quere. Ib.*
5. The form of a rejoinder of *no assets*, and a surrejoinder thereto. *Morgan, v Slade et ux.* 38
6. An act of assembly directing that an auctioneer shall give bond before he obtains a license, if the fact was that the license was obtained prior to the execution of the bond, it was capable of proof, and in the power of the party to have availed himself of it on his plea of general performance, and insisting on that fact in his rejoinder to the replication of the plaintiff assigning the breach. *M'Meehen v The Mayor, &c* 41
8. Where a judgment on a general verdict in *assumpsit* was reversed, because of a defective count in the declaration. *Grant v Ridsdale, et al.* 186
See Criminal Prosecution 4.
——Plene Administravit 1.
——Preference 3.

PLENE ADMINISTRAVIT.
1. On the issue joined to a plea of *plene administravit*, the plaintiff did not offer evidence of any assets which had come to the hands of the defendants, (the executors)—*Held*, that it was necessary for the plaintiff to show that assets had come to the hands of the executors; and that the plea was not an admission of assets to the amount of the plaintiff's claim, although the executors did not prove the contrary by the production of the inventory, or by other evidence. *Wilson's Ex'rs. v Slade, et ux.* 281
See Pleadings 1, 3, 4.

PLOTS.
1. A private plot of the lands in dispute, permitted, under certain circumstances, to be read in evidence. *Howard v Moale, et al. Lessee,* 268
See Location of Lands.
—— Record 1.

POSSESSION.
1. Where two persons are in mixed possession of the same land, the one by right, and the other by wrong, it is the possession of him who is in by right. *Hall v Gittings, Jrs. Lessee,* 115
Cheney v Ringgold, et al. Lessee, 87
2. Possession is presumptive evidence of right, and a defendant in ejectment cannot be deprived of his possession by any person but the rightful owner of the land—that is, he who hath the *jus possessionis. Hall v Gittings, Jrs. Lessee,* 122
3. A person out of possession for more than twenty years, where there is not an adversary possession in virtue of some right or by actual enclosures, his heir, or person claiming under him, may bring an ejectment without an actual entry into the land *Hammond, et al. Lessee v Warfield,* 156
4. A naked possession, (possession without right,) is only adversary to the extent of actual enclosures. *Ib.*

5. Where the facts offered in evidence by the plaintiff were not sufficient and legal evidence to warrant the jury in finding that a person, under whom the plaintiff claimed, died seized of the land for which the ejectment was brought, in opposition to 60 years possession of the defendant—the strongest presumption of a good title being in favour of the defendant. *Davis's Lessee v Davis's Heirs*, 295
6. A parol sale may be made of a slave for a term of years, and then manumitted by the vendee, under an agreement between the vendor and vendee. *Negro Cato v Howard*, 323
7. If the possession of land has gone agreeably to an ancient deed which needed no enrolment, the *inspeximus* of the deed may be read in evidence, and is effectual to pass the land. *Hall v Gittings's Lessee*, 380
8. Where the defendant in an action of ejectment was in possession of 100 acres of land, by enclosures and cultivation, for 15 years, and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged by enclosures, for 6 years thereafter, claiming the same as his own—*Held*, that he had title to the 100 acres by adversary possession. *Ib.* 391

See Bill of Sale 1.
—— Confiscation 2.
—— Ejectment 2, 3, 4, 5, 6, 38.
—— Equitable Estate 1, 2.
—— Escheat 9.
—— Limitation of Actions 2, 3, 6, 10.
—— Trespass 1, 3, 5.

PRACTICE.

1. In executing a commission issued to a foreign country, for the purpose of taking testimony, notice is not necessary, but time should be given that the opposite party may exhibit cross interrogatories. *Owings v Norwood's Lessee*, 98
2. If the plaintiff in an action of *assumpsit* files an account in court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that in which he has elected by his account to consider the defendant his debtor. *De Sobry v Terrier*, 222
3. Testimony taken in a former suit in chancery between the same parties for the same relief, where the suit had been dismissed by the complainant, may be read in evidence by the defendant on the hearing of the new suit. Per *Hanson*, Chan. *Hopkins v Stump et al.* 301

See Abatement 2.
—— Answer in Chancery 2, 3.
—— Bill of Exceptions 2.
—— Bill of Review.
—— Commission & Commissioners 2, 3.
—— Discount 5.
—— Injunction 1.
—— Location of Lands 1, 3, 5, 14.

PREAMBLE.

See Acts of Assembly 4.

PRECEDENT COVENANT.

See Covenant 3, 4, 8.

PREFERENCE.

1. S B sold and transferred to E S, 80 shares of bank stock, and took his notes therefor. Two days thereafter E S became insolvent, and transferred all his property to trustees for the benefit of his creditors. The trustees sold the stock, and received the proceeds. On a bill filed by S B against E S, and the trustees, claiming to be paid the amount of the notes out of the proceeds of the sales of the stock, in preference to the other creditors, it seems that he was not entitled to such preference. *Winchester et al. v Brooke*, 1
2. Where a preference is claimed by one of the creditors, it should appear by the proceedings, that there were other creditors whose claims are proved and allowed; also the amount of the estate and claims should appear, so as to show the proportion which the creditor, claiming the preference, is entitled to, in case he had no right to a preference. *Ibid.*
3. If the laws of this state give a preference to its citizens in the payment of the debts of a deceased, the defendant, if sued by a foreign creditor, must plead such preference. *De Sobry v Terrier*, 224

See Court of Chancery 24.
—— Executors & Administrators 5, 6.

PREROGATIVE.

See Proprietary.

PRESUMPTION.

1. Unless the contrary is proved, it is presumptive evidence that a clerk, who is dead, and who made certain entries on the books of his employer, delivered the goods as charged. *Clarke v Magruder, et al.* 77
2. Where certain facts would not warrant the presuming a mortgage, made

in 1706, was satisfied before 1780, the mortgagee being a *British* subject, and although he was never in possession of the mortgaged premises — the party not showing any title under the mortgagor. *Owings* v *Norwood's Lessee*, 96

3. Where the court would not direct the jury to presume a title had been perfected, conveyances having been produced showing a defective title had been transferred. *Ib.*

4. The jury were directed, that from the length of time elapsed since the making a will, they ought to presume that it had been duly executed and proved. *Hall* v *Gittings Jr's. Lessee*, 121

5. Possession is presumptive evidence of right, and a defendant in ejectment cannot be deprived of his possession by any person but the rightful owner of the land; that is, he who hath the *jus possessionis*. *Ib.* 122

6. An escheat grant is *prima facie* evidence of title, but being a presumption of right, it only exists until the contrary is proved. *Ib.*

7. The jury were directed, that if they believed certain facts, then the presumption of law was, that a certain person was seized of the land, for which the ejectment was brought, at the time of his will and death, and no presumption from the said facts could arise that he was not so seized. *Ib.* 126

See Contract 2.
—— Ejectment 38.
—— Evidence 49, 71.
—— Possession 5.

PRETENSIONS.

See Location of Lands 10, 11, 12, 13.
—— Verdict 4.

PRIMA FACIE EVIDENCE.

See Evidence 15, 65.
—— Justices of the Peace.

PRINCIPAL.

See Court of Chancery 15.

PRIORITY.

See Preference.

PROCEDENDO.

1. The court of appeals having *reversed* a judgment of the court below on the form of proceedings, (there being a material variance between the writ and the declaration,) refused to remit the record with a *procedendo*. *Davis* v *Wilson, et al.* 345

2. The court of appeals concurred in the opinion expressed by the court below in the *bill of exceptions*, but *reversed* the judgment on the *form of proceedings*, and awarded a *procedendo*. *Smith & Buchanan* v *Gorton*, 367

PROCLAMATION WARRANT.

See Grant 41.

PROFITS.

See Guardian 1.

PROMISE.

See Guaranty 1.

PROMISSORY NOTE.

1. An action of *assumpsit* on a promissory note *endorsed in blank* by the payee, may be maintained in the name of the payee for the use of the holder, altho' the holder had paid a valuable consideration for the note to the payee at the time of the endorsement. *Gray & Biddle*, v *Wood et ux.* 328

2. A promissory note is not invalidated by being *antedated*. *Ibid.*

See Bill of Exchange.
—— Notary Public 1.

PROPRIETARY.

1. On the question whether or not a grant of land from the Proprietary to "R M, and the heirs of his body lawfully begotten, for ever," created an estate tail in R M, and upon his death, without issue, the reversion was in the state standing in the place of the proprietary, notwithstanding R M's deed barring the estate tail,—*Held*, that no interest in the nature of a trust estate ever was vested either in the Proprietary, or in the state in the place of the Proprietary, no act having been done which could create a trust in either; and that they could only be considered as parties having a reversionary interest expectant on the determination of the estate tail. *Howard*, v *Moale, et al. Lessee*, 259

2. The *jura regalia*, as attached to the person of the King in *England*, never did attach to the Lord Proprietary of *Maryland*. *Ib.*

3. The Proprietary held the dominion of *Maryland* and property of the soil, which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary, legal and equitable rights, as in the lands of any other person. *Ib.*

4. On an equitable interest being obtained in land agreeably to the rules

of the land-office, the party became entitled to a grant, which he could compel of the Proprietary. *Ib.*

5. The reversionary interest of the Proprietary reserved in land granted by him, might be destroyed by deed made by the tenant in tail under the act of June 1773, *ch* 1, as effectually as the reversionary right of any individual. *Ib.*

6. A subsequent grant covering land in which the Proprietary had a reversionary interest, will operate to pass such reversionary interest. *Ib.*

See Instructions 1.
—— Limitation of Actions 3, 5.
—— State 1.

PROTEST.
See Notary Public 1.

PURCHASE & PURCHASER.
See Market Overt 1, 2.
——Warranty.
——Vendor & Vendee 1.

R.

RECEIPT.
1. A receipt given by the plaintiff's attorney for a sum of money, stated to be in full of a judgment, is not conclusive evidence that the judgment is satisfied, so far as to prevent the plaintiff from taking out execution for any balance which may be actually due thereon. *Hughes v O'Donnell,* 324

RECITAL.
1. The court will not so construe the recital in a bond as to defeat its operation and render it a nullity. *M'Mechen v The Mayor, &c.* 41
See Evidence 24, 25.

RECORD.
1. A warrant of attorney, authorising an attorney to appear for the defendant, need not be spread on the record. *M'Mechen v The Mayor, &c.* 41
See Authentication 2.
—— Bill of Exceptions 1.
—— Court of Appeals 1.
—— Evidence 9, 58, 77, 78.
—— Judgment 1.
—— Notary Public 1.

RECORD EVIDENCE.
See Evidence 9, 58.

REDEMPTION.
See Equity of Redemption.
—— Parol Agreement 2.

REJOINDER.
See Issues 1.

RELATION.
See Escheat 4, 11.
—— Grant 5, 10, 16, 18, 20, 21, 22, 29, 37, 41.

RELEASE.
1. A bond given by one partner for a simple contract debt due from the partners to a creditor, and accepted by him, is by operation of law a release of the other partner, and an extinction of the simple contract debt, at law and in equity. *Williams v Hodgson.* 474
See Evidence 10.
—— Ignorance 1.
——Insolvent Debtor.

RELEVANT.
See Slander 2.

RELIEF.
1. The relief which may have been obtained by a complainant, who has died, may be granted to his representative reviving the suit. *Brogden v Walker's Ex'r.* &c. 293
2. A representative instituting an original suit, may have the same relief which would have been granted to his ancestor, devisor, testator, &c. *Ib.*

REMEDY.
1. It is a general principle, which admits of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired, and the obligations created by it; and the remedy or mode of enforcing the contract is to be conformable to the laws of the country where the action is instituted. *De Sobry v Terrier,* 288
2. A contract made in one country with a view to the execution or performance of it in another country, is governed in all things, both as to its essence and the mode of enforcing it, by the laws of the latter country. *Ib.* 220, 288
See French Laws.

RENT.
See Guardian 1.

REPEAL.
1. A repealing ordinance cannot destroy or affect any right which was acquired

by any person under the first ordinance before the repeal thereof. *M'Mechen v The Mayor, &c.* 41
See Acts of Assembly.

REPLEVIN.

1. If the declaration in an action of replevin does not allege damage to have been sustained, it is fatal. *Faget v Braulon,* 350
2. Where the declaration in replevin alleged the taking of the property to be in *Gay-street, from the dwelling-house of the plaintiff—Held,* that evidence of the defendant's having taken the property in *Gay-street* was sufficient, without proving that he took it from the dwelling-house of the plaintiff. *Ib.*
3. In an action of replevin, the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained. *Dorsey v Gassaway,* 412

See Limitation of Actions 10.
—— Pleading 10.

REPRESENTATIVES.

See Court of Chancery 22, 23.
—— Relief 1, 2.

REPUTATION.

See Hearsay Evidence 2, 3.

RESERVED LANDS.

1. The Proprietary instructions requiring a survey to be made of reserved lands, &c. read in evidence. *Boreing's Lessee v Singery,* 456

RESIDENCE.

1. A temporary residence in any county of the state, is not sufficient to enable a grantor, being a citizen of the state, to acknowledge a deed, during such temporary residence, for land lying in any other county of the state. *Hall v Gittings's Lessee,* 383
2. A permanent residence is not required of a person whose deposition is about to be taken under the act of *July* 1779, *ch.* 8, to perpetuate testimony; but a temporary or transient residence is sufficient. The fact of residence is not required to be placed on record. *Bryden v Taylor,* 396

See Acknowledgment of Deeds 3.
—— Conveyance 6.

RETENTION.

See Discount 3.
—— Overseer 1.
—— Trover 2.

See Executors & Administrators 9, 10, 11.

RETURN & RETURN DAY.

See Description 1.
—— Fieri Facias 2.

REVERSAL.

1. A decree in favour of the *complainant,* but directing that each party bear his own costs, was, on the appeal of the *defendant,* reversed as to costs, and a decree passed directing that the complainant should recover his costs in the court of chancery. *Hoffner v Dickson,* 46
Worthington v Bicknell, 58
Hoffman v Baker, 486
2. Where a judgment of the court below, after a general verdict in *assumpsit,* was reversed, because of a defective count in the declaration. *Grant v Ridsdale, et al.* 186
3. The court of appeals having reversed a judgment of the court below on the form of proceedings, there being a material variance between the writ and the declaration, refused to remit the record with a *procedendo. Davis v Wilson, et al.* 345
4. The court of appeals having concurred in the opinion expressed by the court below in the bill of exceptions, but reversed the judgment on the form of proceedings, awarded a *procedendo. Smith & Buchanan v Gorton,* 367

See Court of Appeals 3.
—— Covenant 8.

REVERSING LINES.

See Verdict 1, 3.

REVERSION.

See Proprietary 1, 5, 6.
—— State 1.

REVIEW.

See Bill of Review.

REVIVOR.

See Bill of Revivor.

RIGHT OF ACTION.

See Ejectment 19.
—— Remedy 1, 2.

RIGHT OF ENTRY.

See Entry 1.

RULES OF THE LAND OFFICE.

See Grant 41.
—— Land Office.

RUNNINGS.
See Trespass 6.

S.

SALE.
1. A slave may be sold by parol for a term of years, and after which to be manumitted by the vendee. *Negro Cato v Howard*, 323
2. If a mortgagor of slaves sells them for a full consideration, and after his discharge under an insolvent law, purchases them of the mortgagee, his subsequent acts in perfecting his title, will enure in law to confirm, and not to defeat his contract with the vendee. *Dorsey v Gassaway*, 411
See Freedom 1.
—— Manumission 3.
—— Market Overt.
—— Warranty.

SATISFACTION.
1. A receipt given for the plaintiff's attorney for a sum of money, stated to be in full of a judgment, is not conclusive evidence that the judgment is satisfied, so far as to prevent the plaintiff from taking out execution for any balance which may be actually due thereon. *Hughes v O'Donnell*, 324

SCIRE FACIAS.
1. If the defendant, during the pendency of a *scire facias* on a judgment against him, aliens his lands, the plaintiff, after a *fiat* on the *scire facias*, may issue a *fieri facias*, and levy it on the lands so aliened, without proceeding against the alienees. *M'Elderry v Smith's Lessee*, 72
2. A *scire facias* against terre-tenants is either general, without naming them, or special against them by name. *Ib.*
See Insolvent Debtor 1.

SEAL.
1. The mere showing the seal of a court of our own state in another court of the state, is a sufficient authentication of the judgment of the court it purports to certify. *De Sobry v Terrier*, 218
2. The seal of the court of a foreign country does not prove itself; but it must be proved by testimony. *Ib.*
3. Parol evidence admitted to prove the seal of a court of a foreign country. *Ib.*
See Bill of Exceptions 1.

SEISIN.
See Ejectment 38.
—— Evidence 49.
—— Possession 5.

SEIZURE.
See Fieri Facias 1.

SET OFF.
See Discount.

SHERIFF.
See Fieri Facias 2.

SIMPLE CONTRACT DEBT.
See Bond 2.
—— Extinguishment 1.
—— Release 1.

SLANDER.
1. In an action of *slander* for words spoken, it was alleged that the defendant had charged the plaintiff with poisoning the defendant's horse—*Held*, that the words were not actionable. *Chaplin v Cruikshanks*, 217
2. —— The court refused to direct the jury, that if the horse was alive, the words laid in the declaration were not actionable, the same being irrelevant to the issue. *Ib.*
3. —— The court also refused to direct the jury, that if the words spoken did not amount to an offence for which the plaintiff might be indicted, they were not actionable, as the defendant might take advantage of it in arrest of judgment. *Ib.*
4. Where the words charged to have been spoken were, that "he the said J *swore false*, and *swore to a lie*," *innuendo*, "meaning that the said J had committed perjury; that the said J had taken a false oath before a magistrate"—*Held*, that the words were not actionable. *Sheely v Biggs*, 363
5. No words are actionable unless they impute a crime to the plaintiff which subjects him to punishment. *Ib.*
6. The office of the *innuendo* is to explain doubtful words where there is matter sufficient in the declaration to maintain the action; and if the words in themselves are not actionable, their meaning cannot be extended by it to make them actionable. *Ib.*
7. If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part, to show they were spoken in a criminal sense, or they are not actionable. *Ib.*
8. To make the word *foresworn*, slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding in which the party was sworn. *Ib.*

SLAVE.

1. A slave may be sold by parol for a term of years, after which to be manumitted by the vendee. *Negro Cato v Howard*, 323

See Bill of Sale 1.
—— Freedom 1, 2.
—— Manumission 3.

SPECIAL AGREEMENT.

1. In *assumpsit* for one years services as an overseer, and a *quantum meruit* for the same services—*Held*, that if there was a special agreement between the plaintiff and defendant for the plaintiff's services as an overseer, the plaintiff could not recover upon his declaration. *Cushman v Sim's Adm'r.* 352

SPECIAL AUTHORITY.

1. A special authority must be strictly pursued. *Bryden v Taylor*, 396

SPECIAL CONTRACT.

See Special Agreement.

SPECIAL DESCRIPTION.

See Description 2, 3.

SPECIAL VERDICT.

1. The admissions of counsel of certain facts stated in a special verdict, taken at a former trial between the same parties in the same action, are not evidence on a new trial of the same cause. *Dorsey v Garsaway*, 402

SPECIAL WARRANT.

1. A special warrant is used to affect cultivated land, in which the location and the quantity of acres are designated, and the party pays the composition money, at or before the time of granting the warrant, for the number of acres so directed. The survey is then made within the usual time of six months, for ascertaining with more exactitude and precision the land thus affected. If on the survey being made, it appears to the party that he has not as much land as he paid for, he can apply the surplus of his warrant to affect any vacant land, which a common warrant is competent to take, whether it lies in contiguity, or detached from the land so located in his warrant. *Hammond, et al. Lessee v Norris*, 152

SPECIFIC PERFORMANCE.

1. The specific performance of a bond, executed in 1764, for conveying a tract of land, decreed, on bill filed in chancery in 1792. *Huffner v Dickson*, 46
2. The specific performance of a bond for conveying land, executed in 1777, decreed, on bill filed in 1797, although strongly contested on the ground that the bond was never executed, or if executed that it was obtained by fraud. *Saunders, et ux. v Simpson, et ux.* 81
3. The court of chancery will not enforce a specific performance of a speculating contract for continental money. *Hopkins v Stump, et al.* 304

See Court of Chancery 30.
—— Parol Agreement.

SPECULATING CONTRACT.

See Specific Performance 3.

STATE.

1. The state held the Proprietary's reversionary interest merely by substitution in his place, and a deed since the act of Nov. 1782, *ch.* 23, was competent to bar and extinguish the reversionary interest of the state. *Howard v Moale, et al. Lessee*, 260

See Adversary Possession 1, 2.
—— Confiscation 2, 3, 5.
—— Escheat 10.
—— Limitation of Actions 5.
—— Office Found.
—— Proprietary 1.

SUCCESSION.

See French Laws 1, 2.
—— Intestate's Estate 1.
—— Testator 1.

SUMMONS.

1. On the death of a defendant in an action of debt, &c. a summons may issue to an executor *de son tort*, (there being no legal executor or administrator of the deceased,) to appear to and defend the action. *Norfolk v Gantt*, 435

SUPERSEDEAS.

1. A writ of error, after seizure under a *fieri facias*, and before sale, is no *supersedeas*. *Beatty's Adm'r. v Chapline*, 7

SURETY.

1. A surety is not answerable beyond his engagement. *M'Mechen v The Mayor, &c.* 41
2. A purchased land from B, and in the bond given for the purchase money, C becomes bound as surety, B having impressed him with an idea that the

money might be paid from the sale of wood on the land, to prevent the sale of which B afterwards obtained an injunction. On a bill in chancery brought by the surety, it was decreed that he should be relieved from his suretyship, *Lynch v Colegate*, 34

3. A complainant is not entitled to relief in equity against the executors of a joint obligor, who was a surety in the bond. Per *Hanson*, Chan. *Williams v Hodgson*, 474 *(note)*

4. A judgment having been obtained by B against E, and C his surety, a *fi. fa.* issued thereon against E, who survived C, and was laid on E's land. The administrator of C paid the amount of the judgment to B, who directed the judgment to be entered for the use of the administrator of C. A *venditioni exponas*, issued for the use of the administrator of C, for a sale of the land, was returned unsold, &c. and was on motion of the defendant *quashed*. *Berry v Nicholls*, 503

See Assignment 1.
—— Court of Chancery 15, 24.
—— Discount 5.
—— Evidence 59, 60.

SURVEY.

See Deposition 1.
—— Grant.
—— Location of Lands.
—— Parol Evidence 3.

SUSPENSION.

See Covenant 1.

T.

TALES.

See Criminal Prosecution 5, 6.

TECHNICAL WORDS.

See Conveyance 2.

TEMPORARY RESIDENCE.

See Acknowledgment of Deeds 3, 4.
—— Residence 2, 3.

TENANT IN COMMON.

1. A tenant in common under the act to direct descents, may dispose of his interest in any particular part of the estate so held in common. *Reinicker v Smith*, 421

See Acts of Assembly 6, 7.
—— Court of Chancery 35.

TENANT IN TAIL.

See Estate Tail.

TERM OF YEARS.

1. A parol sale may be made of a slave for a term of years, and after the expiration thereof to be manumitted by the vendee. *Negro Cato v Howard*, 323

TERRE-TENANT.

See Fieri Facias 3.
—— Scire Facias 1, 2.

TESTAMENTARY BOND.

See Administration Bond.
—— Pleading 1, 2.

TESTATOR.

1. Any creditor may sue an executor *pro forma*, provided he shows himself to be a creditor under the laws of the country where the contract was made; and as long as assets remain in the hands of such executor, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled. *De Sobry v Tarrier*, 224

2. Personal property adheres to the person, and wherever the testator is domicil at the time of his death, the property is to be distributed according to the laws of that country. *Id.*

TESTIMONY.

1. Testimony taken in a former suit in chancery between the same parties for the same relief, and which was dismissed by the complainant, may be read in evidence by the defendants on the hearing of the new suit. *Hopkins v Stump, et al.* 301

2. The testimony of a witness not resident of the state, taken under the act of *July* 1779, *ch.* 8, to perpetuate testimony, read in evidence. See Residence 2, and *Bryden v Taylor*, 396

See Evidence.

TITLE.

1. Where an ejectment can be supported upon an equitable title to lands— See Ejectment 40, and *Keys & Horn v Goldsborough's Lessee*, 369

See Acts 2.
—— Adversary Possession 3, 5, 6.
—— Limitation of Actions 2, 6, 8, 11.
—— Trespass 6.
—— Vendor & Vendee 1.

TREATY.

See Alien 1.
—— Confiscation 3, 4, 6.

TRESPASS.

1. In an action of trespass *q. c. f.* the plaintiff offered to prove that he was in possession of the land on which the trespass was alleged to have been committed, and that the defendant committed the trespass complained of, on the land so in the possession of the plaintiff, at the place by him located on the plots.—*Held*, that such evidence was admissible. *Hogmire et al. v M'Coy*, 351

2. The plaintiff offered to prove by a witness, that he was present when the land, on which the trespass was alleged to have been committed, was originally located or taken up, and that the tract was then located, as it now is on the plots.—*Held*, that the evidence was admissible to prove the original beginning and location of the land. *Ib.*

3. In an action of trespass *q. c. f.* on a tract of land called *G D*, the defendant took defence for a tract of land called *A*, on a part of which the alleged trespass was committed—*Held*, that the plaintiff was only entitled to recover for a trespass committed within the lines of the tract called *G D*, as the same was located by him on the plots, altho' he had been in the possession and cultivation of the land, on which the trespass was alleged to be committed, claiming the same as part of *G D*, for upwards of 50 years, and it has always been called and reputed as part of that tract. *G. & J. Chapman v Brawner*, 365

4. In trespass *q. c. f.* the defendant took defence for, and located on the plots, a tract of land called *G C*, which included a tract called *T N*, on which the trespass was alleged to have been committed, and which last tract the plaintiff located on the plots; and he also located lot No. 3351, but he did not counterlocate the location made by the defendant. The defendant read in evidence the grant of *G C*, which called to begin at the end of the second line of lot No. 3351—*Held*, that it was not necessary for him to produce the grant for lot No. 3351, to prove the location of that lot, and the beginning of *G C*. *Tomlinson v Riser*, 444

5. The court refused to direct the jury in an action of trespass *q. c. f.* that it was incumbent on the plaintiff, in order to support his action, to prove a title to the land, on which the trespass was alleged to be committed, or to prove an actual possession by enclosures, located on the plots. *Ib.*

6. —— Also, that if the plaintiff, 20 years before bringing the action, run his land in the presence of the defendant to a point, marked on the plots, as a boundary between his land and the land of the defendant, and the several lines from that point to certain other points, also marked on the plots, as divisional lines between them; and if the defendant has at no time committed any trespass over said divisional lines, in such case he is not a trespasser, and not liable to the action, unless he was previously warned or forbid to come to said lines. *Thomas v Thomas*, 506

TROVER.

1. A slave having been hired by the *natural* guardian of infant children to a sea captain to perform a voyage on wages, the slave to be safely returned &c. The vessel being sold by her owners at the port to which she went, the slave was furnished with provisions by the captain, and put on board of another vessel bound home, but he never returned. In an action of *trover* by the children against the captain for the value of the slave—*Held*, that the action was well brought. *Hay et al. v Conner*. 347

2. In an action of *trover* brought by an employer against his overseer to recover the value of a hhd. of tobacco made on the plantation, and inspected in the name of the employer, and the note delivered to the overseer to be by him delivered to his employer, but which was retained and sold by the overseer, as his share of the crop of six hhds. under an agreement entered into between the parties, stipulating that the overseer should have one sixth part of all tobacco made—*Held*, that the plaintiff was entitled to recover. *Weems v Stallings*, 365

See Discount 3.

TRUST & TRUSTEE.

1. Whether or not the court is at liberty, in expounding a deed of conveyance creating or limiting a use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties as in a will? *Hollingsworth et ux. v M'Donald et al.* 230

2. Whether a trust estate, or any but a legal estate, can pass by a deed of bargain and sale? *Ib.*
3. Whether a trust estate is answerable to the creditors of *cestui que trust*. *Ib.*
4. As to the distinctions between trusts executed and executory, see the arguments of counsel in this case. *Ib.*
See Court of Chancery 20, 24, 31.
—— Discount 5.
—— Ejectment 40.
—— Evidence 59.
—— Parol Agreement 2.
—— Preference 1.

U.

UNCERTAINTY.

1. There being no designation of part of a tract of land, contracted by a bond of conveyance to be conveyed, nor any description whereby it can be identified, parol evidence is not admissible to show that it was intended by the parties to be laid off in a particular manner; and the bond is void for uncertainty, except on the principle of election. *Hunt & Parks v Gist et al.* 498
See Description 4, 5.

USAGE & PRACTICE.

See Land Office 1, 2, 3, 4, 5, 6, 7.

USE.

See Trust & Trustee.

V.

VACANT LAND.

1. Land included in a grant, but excluded from the certificate of survey on which the grant issued, cannot be taken up as vacant land. *Tolson's Lessee v Lanham*, 174
See Certificate of Survey 1.
—— Grant 15, 16, 19.
—— Relation.
—— Warrant 1.
—— Warrant of Resurvey 2, 4, 5.

VACATING GRANTS, &c.

1. As to a variance between a description of land contracted to be sold and conveyed, and that used in a grant of the land as a ground for vacating the conveyance, &c. See COURT OF CHANCERY 33, and
Hammond v Sappington, 446
See Court of Chancery 44.
—— Fraud 6, 8. 9.
—— Grant 25, 41.
—— Parol Evidence 9.

VARIANCE.

1. As to a variance between a description of land contracted to be sold and conveyed, and that used in a grant of the land—See COURT OF CHANCERY 33, and
Hammond v Sappington, 446
See Location of Lands 9. 10.

VARIATION OF THE COMPASS.

1. The variation of the compass is to be ascertained by the jury on the evidence before them. *Howard v Moale, et al. Lessee*, 274
See Grant 35.
—— Location of Lands 11.

VENDITIONI EXPONAS.

See Fieri Facias 2.

VENDOR AND VENDEE.

1. If a mortgage of slaves was subsisting, and the mortgagor, claiming the absolute ownership of them, sold them for a full consideration, altho' as to the mortgagee, the sale would transfer only the equitable interest in the slaves; yet as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the slaves to the vendee; and notwithstanding the after discharge of the vendor under an insolvent law, and his purchase of the slaves from the mortgagee, his subsequent acts, in perfecting his title to the slaves, will enure in law to confirm, and not to defeat his contract with the vendee. *Dorsey v Gassaway*, 411
See Bill of Sale 1.
—— Equitable Estate 2.

VENIRE.

See Criminal Prosecution 5, 6.

VERBAL AGREEMENT & CONTRACT.

See Contract 3.
—— Parol Agreement.
—— Warranty.

VERDICT.

1. Where the plaintiff has made but one location on the plots of the beginning of the tract of land for which the ejectment is brought, and that is counterlocated, the jury cannot find a beginning for the plaintiff different from that located by him. *Hammond, et al. Lessee v Norris*, 148
2. The jury cannot find a location of their own, but if they find for the

plaintiff, they must find some one of his locations on the plots. *Ib.*

3. If the beginning of a tract of land is lost or cannot be proved, then the beginning is to be found by reversing the lines of the tract from the first known and established boundary. *Ib.* 419

4. The jury by their verdict in an action of ejectment, found the true location of the land for which the ejectment was brought to be from letter *A* on the plots to *a*, to 3, to *four perches below* big *F*, the head of *H*'s branch, and then to *A*; they also found for the plaintiff his pretensions (not being to the extent of the said location) to be from *A* to *a*, to *V*, to *four perches below* big *F*, the head of *H*'s branch, and then to *A*, and that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land—*Held*, that there was no uncertainty in the verdict. *Howard v Moale, et al Lessee*, 276

5. In an action of ejectment for 50 acres of arable land, 10 acres of meadow and 100 acres of wood-land, part of a tract of land called *H F*, the jury by their verdict found the true location of that tract, and also the locationsof other tracts for which the defendant took defence—They also found for the plaintiff all the land called *H F*, as located by them, which lies clear of the other tracts, so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and J S, from a particular po nt to another point—*Held*, that the verdict, and the judgment rendered thereon, were not uncertain, and were not for more land than the plaintiff claimed in his action. *Hall v Gittings's Lessee*, 393

6. Where the fact of the forgery of a certificate of survey, under the grant on which the defendant claimed, came before the court and jury collaterally, in an action of ejectment, and was not directly in question, the issue between the parties being, who had the right of possession to the land in controversy, the verdict, which was in favour of the defendant, cannot be received as evidence to prove that the certificate was not forged. *Singery v The Attorney-General*, 487

7 —— The court not having directed the jury, that if they found the certificate forged, that nothing passed by the grant, it may be questioned whether the verdict could conclude the plaintiff, if the fact of forgery had been directly in issue. *Ib.*

See Court of Chancery 17.
—— Issues 2.
—— Judgment 7.
—— Reversal 1.
—— Variation of the Compass.

VESTED ESTATE.

See Acts of Assembly 6.

VESTED RIGHTS.

See Acts of Assembly 3.
——Repeal 1.

VINDICTIVE DAMAGES.

See Covenant 7.

VOID & VOIDABLE.

See Evidence 9.
—— Grant 15.
——Uncertainty 1.

W.

WARRANT.

1. The nature and efficient qualities of the different kinds of warrants which are used to take up vacant land—*See* Common Warrant 1. Special Warrant 1, Warrant of Resurvey 1, and
Hammond, et al. Lessee v Norris, 132

WARRANT OF ATTORNEY.

See Corporation 1.
—— Record 1.

WARRANT OF RESURVEY.

1. A warrant of resurvey is taken out for the purpose of resurveying a tract or parcel of land in which the party has a fee simple. In virtue of such warrant he acquires a right of preemption in all the adjoining vacancy, and if he makes his survey, and pays the caution money within *two* years from the date of his warrant, he has a complete equitable interest in all the vacancy included in his survey. *Hammond, et al. Lessee v Norris*, 132

2. A person who takes out a warrant of resurvey without being seized of the original tract resurveyed, acquires a title in the vacant land included in such resurvey, when the composition money is paid, unless some other person in the mean time becomes interested in such vacant land. *Ib.*

3. A warrant of resurvey taken out by a person not seized of the original tract, is not legal notice of the loca-

tion of the warrant. *Hammond, et al. Lessee v Norris*, 123
Hammond, et al. Lessee v Warfield, 151
4. A grant for vacant land, not contiguous to the original tract, included in a certificate under a warrant of resurvey, will operate to pass such vacant land, unless some other person in the mean time becomes interested in such vacancy. *Hammond et al. Lessee v Warfield*, 152, 155.
5. Where vacant land, not contiguous to the original tract resurveyed, is included in a certificate of resurvey, it is not legal notice of the location of the warrant until the certificate is returned to the land office. *Ib.* 155
See Grant 41.

WARRANTY.

1. If the seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of this affirmation, and they afterwards appear to be different, the purchaser may return the goods, and recover back the money, in an action for money had and received; or he may even have this action without a return of the goods if he give notice to the seller where they are deposited. *Rutter v Blake*, 253
2. If A sells a horse to B, affirming him to be sound, and B receives the horse, and sets out on a journey, but finds the horse to be unsound, and leaves him on the road, he may recover back the money he paid for him, in an action for money had and received, if he gives notice to A where the horse is; and he is not bound to return the horse. *Ib.*
3. —— But if B gives no notice to A, but sends the horse to vendue, and sells him for half what he gave—Here B has elected to abide by his contract, and he can never resort to A to make good the difference of price. *Ib.*
4. If a merchant buys goods, the seller warranting them to be of a particular description of quality, and the merchant, without examining, sends them to the *West Indies*, where, upon opening, he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover back the money paid for them, in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages for the full amount of the injury he has sustained—nor is he obliged to return the goods, or put himself to any further expense or trouble about them. *Ib.*
5. —— But if the merchant sells the goods, and receives the amount of sales, not as agent for the seller, but upon his own account, it will deprive the merchant of his remedy upon the warranty. *Ib.*
See Counterfeit Bank Note.

WILL.

1. Whether or not a will was legally executed and proved, are matters of fact for the jury. *Hall v Gittings Jr. Lessee*, 121
2. The jury were directed, that from the length of time elapsed since the making of a will, they ought to presume it had been duly executed and proved. *Ib.*
3. A paper was exhibited for record as the last will of C W, proved to have been signed by him at a time when he was about to leave the state. It was couched somewhat in the form of a letter, and stated, "If I should not come to you again, my son M shall pay," &c. Evidence was given that he went to *Kentucky*, and returned, and that he lived several weeks thereafter—*Held*, that the paper could not be admitted to record as the will of C W. *Wagner v M'Donald*, 346
4. In expounding wills, the first and great principle to be observed is, that the intention of the testator is to prevail, unless such intention is opposed to some rule of law. *Drury & Bennett v Negro Grace*, 356
See Authentication 1.
—— Bequest.
—— Devise.
—— Evidence 33.
—— Foreign Laws 1.
—— Parol Evidence 7.

WITNESS.

1. If the testimony of a witness is intended to be objected to in an action of ejectment because of his holding adjoining lands, &c. his interest must be located on the plots. *Hall v Gittings Jrs. Lessee*, 120
2. The declarations of a former holder of adjoining lands as to the bounds of the land in dispute in an action of ejectment, were admitted in evidence, it not appearing by the plots that he was interested. *Ib.* 121
3. A *feme covert*, one of the grantors in a deed conveying a tract of land, the acknowledgment of which by her having been declared to be defective,

was admitted to give evidence on the part of the defendant, in an action of ejectment brought for the same land, by a person claiming under her deed. *Hall v Gittings's Lessee*, 386 *(note.)*

4. The deposition of a witness, non resident of the state, taken under the act of July 1779, *ch.* 8, to perpetuate testimony, admitted in evidence—See Residence, 2, and *Bryden v Taylor*, 396

5. A witness may recur to a paper, which is not evidence, for the purpose of refreshing his memory. *Dorsey v Gassaway*, 410

See Answer in Chancery 1, 2,
—— Competent Witness 1.
—— Credibility 1.
—— Deposition 1, 2.
—— Manumission 1, 2.

WORDS.

See Slander.

WRIT OF ERROR.

1. A writ of error, after seizure under a *fieri facias*, and before a sale, is no *supersedeas*. *Beatty's Adm'r. v Chapline*, 7

See Abatement 1.

END OF THE SECOND VOLUME.

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